IN THE

Supreme Court of the United States

October Term, 1948.

No. 450.

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,
Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

LUTHER ROBINSON MADDOX,
Attorney for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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Your petitioners respectfully pray that a writ of certiorari issue from this Court to the United States Court of Appeals, District of Columbia Circuit (hereinafter referred to as the "Circuit Court"), to review its decision and final judgment entered on September 20, 1948 (R. 190), affirming the judgment and order of the United States District Court for the District of Columbia (hereinafter referred to as the "Trial Court"), which admitted to probate and record as the last will and testament of Mary Elizabeth Ellyson, de-

ceased, a paper writing dated April 14, 1944 (R. 1-2; Tr. 1-2, photo copy). These petitioners duly filed a petition for reconsideration and rehearing of the Circuit Court's decision, and it was denied on October 25, 1948 (R. 191-209). No opposition to this petition was filed by Respondents.

Statement of Matter Involved.

Judge Matthew F. McGuire presided in the Trial Court. The appeal was argued in the Circuit Court before Associate Judges Clark and Wilbur K. Miller, with whom also sat by designation District Judge Curran, of the court appealed from. The opinion is by Judge Clark (R. 186, 189). The opinion is devoid of so many material facts of record on which Petitioners' appeal was based, and its language so general concerning such contentions as it rules upon, that it could not be cited with confidence upon any point; and hence, if there were no other ground for this Court's jurisdiction, it is submitted that on this ground alone the opinion calls for the exercise of this Court's supervision over the lower Federal Courts. It is suggested that an opinion so lacking in clarity and essential details is unfair to the party against whom it is rendered. This Court's attention is particularly invited to the pages thereof shown at pp. 186 and 187 of the record. In this situation, Petitioners feel compelled to detail the facts in this statement more fully than would otherwise be necessary, and pray this Court's indulgence therefor.

The main issue in this will contest was, of course, whether or not the paper writing of April 14, 1944, was the will of Mary Elizabeth Ellyson (hereinafter referred to as "Testatrix"); the subsidiary issues being testamentary capacity, fraud and undue influence (R. 10, 17, 18). The case was tried to a jury, which, after a full five-day trial, brought in

a verdict on February 28, 1947, upholding the will on the issues of testamentary capacity and undue influence submitted to them; the Trial Judge directed a verdict on the issue of fraud (R. 17, 18, 169). The judgment and order appealed from was entered four days later (R. 22). Petitioners' motion for a new trial, duly filed, (R. 23-26) was summarily denied by the Trial Judge, without any findings or order except a notation on the motion "Denied. McGuire, J. 3/26/47"; the request of Petitioners' counsel for leave to argue the motion orally and submit newly-found law having been also refused (R. 23-27) by the Trial Judge, notwithstanding that at the trial he had asked Petitioners' counsel for authority about the competency of Dr. Luther H. Snyder to give an expert opinion on mental capacity, which authority counsel was unprepared at the time to furnish, and had excluded this witness' testimony *in toto* (R. 101; Tr. 368, 369).

The caveator-plaintiffs were Mrs. Mabel Adams (hereinafter referred to as "Mrs. Adams"), former companion and housekeeper for the Testatrix and a substantial beneficiary in a will executed by the Testatrix immediately prior to the contested paper (hereinafter referred to as "the will"), who was represented at the trial by separate counsel, Messrs. Diamond and Jackson (R. 11, 27), and did not appeal; and all the present petitioners, with the exception of Mrs. Ethel Ellyson Pollard, who died while the appeal has been pending and for whom there is no successor party. The caveatee-defendants, appellees below, were the respondents shown above. Clayton Hawfield (hereinafter called "Dr. Hawfield"), the executor named in the will, had been the Testatrix's physician since about 1931, and, after the will was executed, retained custody of it until after her death (R. 122, 150). Mrs. Frances Gertrude Scott (hereinafter called "Nurse Scott"), a legatee,

was a graduate nurse employed in such capacity for the Testatrix. Mrs. Florence O. Metz, also a legatee (hereinafter called "Mrs. Metz"), was a niece of the Testatrix, who resided in Arlington, Virginia. At the time of procurement and execution of the will, however, Mrs. Metz was living most of the time in the Testatrix's home, and was the Testatrix's attorney-in-fact under a power of attorney dated March 31, 1944, executed two weeks before the will was executed (R. 177; Tr. 37, 38, 39, photo copies). Miss Mary Elizabeth Harvey and Aubrey Harvey, both also legatees (hereinafter called "Miss Harvey" and "Mr. Harvey"), were a niece and grand-nephew, respectively, of the Testatrix; Mr. Harvey being Miss Harvey's nephew.

The Testatrix died on January 7, 1946, at the age of eighty-six years. She had never married, and her only heirs and next of kin were the children and grandchildren, including these Petitioners, of her several deceased brothers and sisters. At her death, she had been for about six years continuously confined to her bed (and unable to leave it except when lifted therefrom) by paralysis of her entire right side, which deprived her of the use of her right leg, arm and hand (R. 35, 40, 36, 102, 109, 142-147), and which followed in about a month a fall, in April, 1940, in which she struck her head against a door. There was testimony, too, that the paralysis was the result of a cerebral hemorrhage, by Mrs. Mattie Edwards (hereinafter referred to as "Nurse Edwards") (R. 35; Tr. 581-585). From the time she was stricken with paralysis up to and including the period during which the will was executed, the Testatrix had been administered constantly, day and night, the narcotic drugs pantopon and phenobarbital (R. 36, 41; Tr. 583).

Before Petitioners had rested their case, the Trial Judge announced his intention to direct a verdict for the Respondents on the issue of undue influence (R. 62, 96-98), but later

reversed this decision (R. 137, 169), stating he would submit that issue to the jury, but would withdraw from them instead the issue of fraud, which was done.

Prior to final arguments, and before the Trial Judge charged the jury, written prayers for instructions were submitted to the Trial Judge and discussed at the bench (R. 148, 149, 164, Tr. 570-578, 646). He thereupon denied Petitioners' Prayer No. 7, at the bottom of which was cited authority (R. 21, 22), for an instruction that a presumption of testamentary incapacity was raised by evidence of the Testatrix's incompetency to transact business immediately before and after the date of execution of the will *(Ralston v. Turpin,* 129 U. S. 663, cited in Doyle v. Rody); and tentatively granted their Prayer No. 2 (on the authority of *Hagerty v. Olmstead,* 39 App. D. C. 170, cited below the prayer), for an instruction that a presumption of undue influence was raised by special facts in evidence (R. 18-20). In thus tentatively granting this prayer, the Trial Judge expressed the opinion that a confidential relationship had been shown to have existed between the Testatrix and the legatee Mrs. Metz (Tr. 571). Later, however, but prior to arguments and charge to the jury (R. 164), he also denied Prayer No. 2, on the authority of the same case, stating, in effect, that no confidential relationship which could be an element in raising such a presumption had been shown. It will be noted that a confidential relationship also existed between the Testatrix and her nurse, Nurse Scott, also a legatee.

In 1931, 1932 and 1941, respectively, the Testatrix had executed three prior wills, and, in 1939, a codicil to the 1932 will (R. 3-5, 176). These papers, and the contested will, were introduced into evidence by Petitioners' counsel (R. 43, 77; Tr. 118-130), and photostatic copies are part of the original record herein (Tr. 3-12). From 1931 until

August of 1946, when a Collector *pendente lite* was appointed by the Court in these proceedings, the National Savings & Trust Company of Washington (hereinafter called the "Bank"), had carried a trust fund and account in the name of the Testatrix and handled her banking affairs. The Trial Judge, however, prohibited Petitioners' counsel from any inquiry concerning this account (R. 77-84, 95, 96; Tr. 280-304, 349). All the prior wills (and the codicil) had been prepared under the supervision of this Bank and witnessed by one or more of its officers, and in them the Bank was named executor and trustee of the residuary estate. The prior wills are alike in form, and consistently name as legatees some ten heirs and next of kin from the several branches of the Testatrix's family. The 1939 codicil makes a bequest of $2,000 to the housekeeper, Mrs. Adams, and the last prior will of 1941 includes the $2,000 bequest and provides for her to receive in addition one-tenth of the residuary estate.

Notwithstanding the fact that the Bank was then handling the Testatrix's financial affairs precisely as it had been doing for the previous thirteen years, the contested will was drawn and filed, and the execution thereof supervised (although not attested) by Mrs. Metz's attorney (R. 119, 120, 126, 160, 161, 166), who had never before acted as attorney for the Testatrix (R. 41, 44, 134). This attorney actively represented all the respondents at the trial (and on appeal), as their sole counsel, and was thus enabled, without taking the stand or otherwise testifying under oath, greatly to reinforce Respondents' case by questions of the tenor of: "Now tell * * * what happened from the time you saw me in her room" (R. 28); "Well, now, tell the Court and jury what happened * * * before I got there and from the time I got there" (R. 33); "Then subsequent to that, did you come to my office and have a power

of attorney written up?" (R. 114); "What discussion did you have with me, if any, about the will in the early part of March, '44?" (R. 152); "Now, Doctor, was there anything else said on the 13th while you and I were there?"; "Did I request that you get another witness?" (R. 152); and by *actually testifying personally in his argument to the Jury* (R. 166), without any protective measures being taken by the Trial Judge, when objection to this form of argument was twice made by Petitioners' counsel *(Katz v. Del. & H. R. Corp.*, 38 F. S. 698).

Through Mrs. Metz the Respondents attempted to raise the inference that the Bank had not been contacted about the new will because Mr. Hall, the Bank's trust officer, had failed to come to the house to see the Testatrix about some power of attorney for Mrs. Adams (R. 111, 112, 126), and Mrs. Adams had said she had had difficulty in contacting Mr. Hall in that matter. Yet Mrs. Metz also testified (R. 114, 115) that even before the power of attorney of March 31st was executed, two weeks before the will was executed, she, Mr. Brick (the attorney who drew the will) and Nurse Scott had conferred with Mr. Hall at the Bank about the Testatrix's account and business there; and that Mr. Brick had talked with the Bank about discharging Mrs. Adams even prior to her dismissal on March 20th (R. 136). And Mr. Hall also testified that Mr. Brick and Mrs. Metz had called together and conferred with him shortly after Mrs. Adams left (R. 78, 79). The Trial Judge, however, precluded this witness from answering questions by Petitioners' counsel as to whether or not his Bank had been in any manner informed about the new will (R. 78, 83).

As the prior testamentary papers most pointedly evidence, the will departs radically (in substance and form) from the fixed plan and purpose of the Testatrix as to the distribution of her property among relatives entertained

by her over a period of some thirteen years. In the 1944 will there are no specific bequests, except a legacy of $500 for Nurse Scott, never previously mentioned; nothing is left to Mrs. Adams, a legatee in the 1939 codicil and 1941 will, or to seven others mentioned in the 1941 paper; and, with the exception of the token bequest to Nurse Scott, the whole estate is bequeathed in blanket form to the Respondents Mrs. Metz, Miss Harvey and Mr. Harvey, share and share alike, and even the style of name of the residuary legatees is different from their designations in the previous papers.

On March 18, 1944, the bedridden Testatrix was attacked by a further illness so severe that an extra nurse was required, and Nurse Edwards was engaged as a night nurse to assist Nurse Scott, the regularly employed day nurse, and remained in such capacity until about the last of April (R. 35-38, 147, 148). And about this time Mrs. Metz, who had previously visited her aunt, according to Mrs. Adams' testimony (R. 38), only occasionally, practically took up residence at the Testatrix's home and assumed control of her finances and person (R. 39, 84-90, 129). As to the nature of this illness, several witnesses (among them, Nurse Edwards) testified it was pneumonia, (and a letter of Mrs. Metz, introduced into evidence, also states the disease was pneumonia) (R. 35, 42, 129). These witnesses, however (and Petitioners' counsel), were repeatedly admonished by the Trial Judge for so characterizing the malady, on the ground that such characterization was hearsay evidence; including in this category the testimony of Mrs. Adams that Dr. Hawfield had told her the Testatrix had pneumonia (R. 42), although Dr. Hawfield was not only a party defendant (who offered himself as his own witness), but was shown to have taken an active part, in conjunction with Mrs. Metz, in the procurement and execution of the will and the power of attorney more particularly referred

to later (R. 160). The Trial Judge also deleted a reference to pneumonia from a proposed hypothetical question for the physician offered by Petitioners as an expert witness (R. 99-101; Tr. 351-369, 468-472), above mentioned.

While the Trial Judge did not specifically instruct the jury to disregard this testimony regarding pneumonia or order it stricken *(nor any of the great amount of evidence he excluded)*, instructing them only generally in his charge that they were not to consider *any evidence rejected or stricken by the Court* (R. 169-170), undoubtedly they understood that they could not regard the Testatrix's illness at that time as anything more serious than the "cold" it was called by Respondents after they had heard the Trial Judge ban the word "pneumonia" (R. 35, 39, 42, 64, 66, 68, 85, 110, 135, 143; Tr. 84, 88, 91, 92, 105, 116, 117, 201, 207, 209, 227, 234, 244, 247, 254, 276, 277, 308, 316, 361, 458, 499, 518, 550, 556). And this even though Dr. Hawfield (barred on statutory grounds from testifying professionally—R. 150), testified on direct examination (R. 151) that prior to this illness he had visited the Testatrix professionally on an average of once a week, and, on cross examination, that from March 17th through March 31st he visited her daily; for the first seven days of April, "every other day; on the third day on the 10th, and after that again on the 14th" (R. 159); and at other points in his testimony that he saw her also on April 13th (R. 152, 153, 162). Bearing on the credibility of the Respondents, on this point as well as all others about which they testified, is a fact of which this Court, it is believed, will take judicial notice (although it apparently carried no weight with the jury): That the legatees, as party defendants, sat within the rail during the entire trial, and were thus enabled, when their turn to testify arrived, to shape their testimony to their advantage.

For many years the Testatrix had owned, and until she became bedridden actively conducted, the 14-room rooming-house which was her home and where she died. In 1932, shortly after the death of Dr. Maitland Ellyson, an unmarried brother who had lived with her (and whose estate the Bank had also handled—R. 76, 77, 88, 132; Tr. 508), she engaged Mrs. Adams, and Mrs. Adams remained continuously in her employ until she was peremptorily discharged by Mrs. Metz on March 20, 1944, and compelled by her to leave the Testatrix's house the following day (R. 39, 113, 118). That, over the twelve-year period, the tie between the Testatrix and Mrs. Adams had been close and affectionate was testified to not only by Mrs. Adams, but by disinterested witnesses for the Petitioners, and even by the Respondents Mrs. Metz and Miss Harvey (R. 54, 65, 108, 133, 136; Tr. 163). Such was the confidence and trust reposed by the Testatrix in Mrs. Adams that, prior to her stroke, she had taken several extended trips, leaving Mrs. Adams in complete control of her rooming-house business and other affairs (R. 39). And, after she became incapacitated to attend to any of her business personally, it was to Mrs. Adams (and not to Mrs. Metz in Arlington) that she entrusted all of it: the management of the rooming-house; the collection of room rents and the buying of supplies out of such funds; the supervision of payment of operating expenses; the necessary transactions with the Bank (R. 38, 39, 78, 83, 84). Mrs. Metz on cross examination testified that in 1940 (R. 131, 132) she had consulted an attorney about obtaining such a power of attorney as she procured on March 31, 1944, to take over control of her aunt's affairs, but was deterred from proceeding with this plan then by the Testatrix herself, who told Mrs. Metz she had everything fixed at the Bank and she need not worry; that her aunt trusted everything to Mrs. Adams and Mr. Hall

(R. 131). Mrs. Metz further testified that the Testatrix "didn't want any of the relatives to meddle in her affairs," (R. 117) and Miss Harvey testified she "never liked anybody to meddle in her affairs," (R. 107).

Throughout her twelve years of service, Mrs. Adams received as pay forty dollars a month and keep; the Testatrix telling her that, instead of increasing her wages, she was providing for her by will. As to this intention of the Testatrix to take care of Mrs. Adams by will, Miss Harvey, as well as Mrs. Adams, testified, and the 1939 and 1941 testamentary papers evidence this intent.

No reasons were given Mrs. Adams for her discharge by Mrs. Metz—just three weeks before the will was executed and while the Testatrix's illness was in its most serious stage —and none but the most trivial were even suggested in testimony, and by only Mrs. Metz and Nurse Scott. *No one but Mrs. Metz testified that the Testatrix had ordered or desired, or ever knew about, the dismissal of Mrs. Adams.* And the testimony of disinterested witnesses (R. 48, 54, 55) indicated most strongly that the Testatrix believed this friend and confidante of long standing had voluntarily deserted her and was bewildered about her doing so. One of these, Elizabeth Allen, a cleaning woman long in the employ of the Testatrix, testified that the feeling between the Testatrix and Mrs. Adams had always been "good feeling, love feeling" (R. 54, 55), and that, after Mrs. Adams left, the Testatrix would send her love to Mrs. Adams by this witness, and repeatedly asked of her "why did she leave."

The Petitioners' witnesses were Mrs. Adams; Ethel Ellyson Pollard; the petitioner Mary Ellyson Dowdy; Hilda May Olson, a grand-niece of the Testatrix, who had known her many years and visited her frequently before

and after she became an invalid, and who, after being reminded by the Trial Judge that she was a legatee in the 1941 will, testified she did not consider the Testatrix competent to make a will after her stroke in 1940 (R. 53); Mrs. F. Iris Amos, a long-time friend who visited the Testatrix often; two of the roomers (one who had lived at the Testatrix's rooming-house thirty-six years), George Thomas and Stephen Day; two of the help: Marcellus Miles, hired to move the Testatrix back and forth from her wheelchair, and Elizabeth Allen, the cleaning woman; and Mr. Hall, the Bank's trust officer. Eight of these witnesses, five disinterested, related incidents and circumstances of their relations with the Testatrix indicating most strongly that her mental faculties had progressively deteriorated after her stroke to the point that, at the time the will and power of attorney were executed, she was in a condition approximating senile dementia—childish; unable to carry on a connected conversation; answered questions merely by "Yes" or "No" or nodding her head, so that it could not be determined whether she understood them; failed to recognize relatives she had known long and well—and all testified in effect that she was incompetent to make a will on April 14, 1944 and incapable of realizing what she was doing if she signed such a paper (R. 42, 46, 47, 48, 49, 52, 53, 57, 63, 66, 91, 92, 93; Tr. 176). Three of these witnesses (two Olson and Dowdy, *named in the 1941 will)* testified that although shortly after her stroke the Testatrix knew them when they visited her, in 1942 and 1943 she no longer recognized them (R. 47, 52, 93); and Mrs. Olson, one of the 1941 legatees, also testified that in 1945 the Testatrix could not remember her even when told her name and relationship (R. 52). Some of these witnesses who had been around the Testatrix daily testified that they had never seen her read after 1940, and two that, some time before

the will was executed, she had told them she had lost the power to read (R. 40, 45, 50, 51, 59).

The only witnesses for the Respondents were the interested parties themselves (the four beneficiaries in the will), Dr. Hawfield (the executor), and the three attesting witnesses. The substance of the testimony of all the Respondents was that the Testatrix, subsequent to her stroke (Mr. Harvey did not see her after Easter of 1941—R. 101, 102), during the severe illness of 1944, and up to her death, was *always mentally alert and bright*, and, in their opinion, fully capable of executing a will on April 14, 1944 (R. 28-38, 101-165). The record discloses that Dr. Hawfield took so active a part in the procurement and execution of both the will and the power of attorney that he too may be classed as an interested party, rather than a mere formal party by reason of his role as executor. Both he and Nurse Scott testified (R. 142-149, 150-165) that the Testatrix had told them, separately, she wanted to make a new will; although Mrs. Metz, the niece to whom (as she testified and the power of attorney indicates) she turned over complete control of her finances and affairs while she was desperately ill, and to whom, therefore, logically, the Testatrix would have communicated this wish—Mrs. Metz testified the Testatrix never mentioned a will to her, but she learned of the Testatrix's desire to make one by overhearing her communicate this desire to Nurse Scott (117, 126, 135). It was Dr. Hawfield who procured, when the Testatrix was so ill that he was visiting her daily professionally, the odd signature "Miss Mollie Ellyson" to the odd power of attorney (R. 138, 177; Tr. 37-39). It was he who, in March, 1944, first contacted Mr. Brick about drawing the will (R. 152). And notwithstanding that, as found by the Circuit Court (R. 186, 187), the Testatrix was recovering from the serious illness when interviewed about the will on April 13th and

when she executed it the following day, and hence did not require the attendance of a physician, he was, by prearrangement with Mr. Brick (R. 152, 153, 166), present at and an active participant in both functions (R. 152, 153, 154, 155, 157, 159, 160, 162, 163). Nurse Edwards testified that he and she held the book on which the Testatrix signed the will (R. 36). *(Where the attesting witnesses signed was not shown.)* He testified (and Mr. Brick in his closing argument corroborated him—R. 166) that it was to him the Testatrix dictated the provisions of the will; and, in connection with the provision for $500 for Nurse Scott (presumably being paid the high salary of a graduate nurse, although the Trial Judge would not permit Petitioners' counsel to inquire as to this—R. 81, 95), that he tried to persuade her to increase the amount of the bequest to this nurse (R. 153, 162), although he disclaimed any personal interest in Nurse Scott (R. 162, 163).

The witnesses assembled to witness the will were not neighbors, or roomers or other inmates of the rooming-house, or anyone who, by reason of long acquaintance, would have known her condition best. A Mrs. Tracy, who succeeded Mrs. Adams as housekeeper (R. 55), was not called to attest the will (nor produced at the trial). The first of the attesting witnesses to testify was Dr. Hawfield's wife who, both he and she testified (R. 28-30, 150-164), happened to be outside the Testatrix's home in their car (although others testified they came in together—R. 30, 33, 36) and so was called in. She had seen the Testatrix but once some months before, did not converse with her when the will was executed, and did not know her condition (R. 28-30). And, *three times*, she testified that *her husband was not present when the will was executed* (R. 28-30), although he and the other two attesting witnesses later testified he *was present* (R. 32, 36, 154, 155, 160). The

second attesting witness to testify (Mrs. McCombs) was a close friend of many years' standing of the lawyer who drafted the will, whom he brought from his office to witness the document (R. 30-33). She had never seen the Testatrix before, had no conversation with her, and had no prior information as to her mental or physical condition. The third attesting witness was Nurse Edwards, whose name appears also on the power of attorney as a witness. Although she, of the three, should have known the Testatrix's condition best, she gave the least positive testimony about it, as well as about the facts of execution (R. 33-38). She had no conversation with the Testatrix on the occasion, either. The Trial Judge excluded questions by Petitioners' counsel concerning when, where and if she signed the power of attorney and as to what she had told counsel about it several months prior to the trial (R. 37). It is very significant that none of these witnesses testified they had signed in the presence of the Testatrix; and from Mrs. Metz's testimony it later appeared that the Testatrix lay in the front of two connecting parlors *"almost like one room"* (R. 115, 140, 141), and so the witnesses could have been grouped in the back parlor and able to observe the Testatrix without her being aware of their presence.

The record discloses that the testimony of these attesting witnesses and Dr. Hawfield as to the facts of execution (though differing materially on other points) was almost word for word, so alike in substance and phraseology as to raise most strongly the inference that they had been coached and were not testifying from memory; and, moreover, it was inherently improbable and contrary to normal experience.

The record discloses that the Trial Judge's unusually active participation in the trial, and his open adverse

criticism of Petitioners' counsel frequently had the effect of disconcerting and confusing both witnesses and counsel (and doubtless also the jury) (Tr. 109, 110, 119, 133, 161, 165, 246, 300, 328, 341); and that many times he aided the Respondents by excluding questions and answers to which their counsel had not objected (Tr. 109, 110, 119, 133, 165).

Much animated colloquy, both at the bench and in the presence of the jury, was occasioned by persistent efforts of Petitioners' to introduce into evidence and inquire into the facts and circumstances surrounding the procurement and execution of, the power of attorney of March 31, 1944; drawn by Mrs. Metz's attorney at the solicitation of herself and Dr. Hawfield (R. 113, 114, 120, 123, 134, 136, 141, 154, 155), and without any contact by this attorney with the Testatrix, as Mr. Brick himself told the jury (R. 166). Petitioners' counsel endeavored to convince the Trial Judge that even the validity of this instrument was a proper subject of inquiry as a circumstance bearing directly on the validity of the will. But the Trial Judge repeatedly ruled out such line of inquiry on the ground that such evidence was *res inter alios acta* (R. 71-73, 79-82, 95, 97, 98, 123, 124, 149; Tr. 295, 298, 353, 481, 482), *and even prohibited Petitioners' counsel from cross-examining fully Mrs. Metz and Dr. Hawfield on the subject when they had testified extensively about it on direct examination* (R. 111, 113, 114, 115, 154). (See *Boosalis v. Crawford*, 69 App. D. C. 141, 99 F. 2d 374.) After Petitioners' counsel had been precluded from introducing the paper for any purpose Mrs. Adams' counsel was permitted to do so for the sole purpose (expressly so limited by the Trial Judge) of impeaching Mrs. Metz on her testimony that she had discharged Mrs. Metz under its authority on March 20th when the paper was dated March 31st (R. 138). On this point Mrs.

Metz had already impeached herself on direct examination (R. 113).

Under the doctrine of *res inter alios acta* the Trial Judge likewise prohibited Petitioners' counsel from introducing into evidence certain checks drawn to the order of the Testatrix and her estate and inquiring into the circumstances surrounding their endorsement and negotiation by Mrs. Metz (R. 149, 164, 165); also, from interrogating the witness Hall concerning the Testatrix's account with the Bank (the records of which he brought into court under subpoena *duces tecum)* and Mrs. Metz's transactions in connection therewith (R. 81, 82, 84).

The Trial Judge very narrowly restricted Petitioners' counsel on direct examination (R. 42, 50, 51, 53, 55, 56, 58, 62-66, 68-75, 81-86, 91, 93-95), and more narrowly on cross examination, *even of the principal party defendants* (R. 36, 37, 108, 120, 123, 124, 127, 128, 130, 131 147, 160, 161).

After the Trial Judge had, at the bench, amended the hypothetical question drafted by Petitioners' counsel for propounding to Dr. Snyder, by deleting therefrom a reference to pneumonia and otherwise changing it (Tr. 468-472), Dr. Snyder was called to the stand on behalf of Petitioners to give his opinion as an expert, in answer to such amended hypothetical question, concerning the Testatrix's mental condition at the time the will was executed. In answer to preliminary qualifying questions, he stated: He held the degrees of Bachelor of Arts and Doctor of Medicine; had been on the medical staff of George Washington University since 1936, except during war service in the Army Medical Corps; was a member of the medical teaching and executive staff of Doctors' Hospital, and associate in Medicine at Garfield Memorial Hospital; was licensed to practice and had practiced medicine in the District of Columbia twelve

years, and had attended patients suffering from paralysis; that his specialty was internal medicine, which included diagnosis and treatment of diseases involving the chest, heart, blood vessels, abdomen and nervous system (R. 99-101). Petitioners' counsel had just commenced a question as to how many cases of paralysis the doctor had treated (and at the bench told the Trial Judge the doctor was an expert on the particular form of paralysis from which the Testatrix was suffering and had handled as many as fifty cases), when, upon objection to his qualifications by Respondents' counsel, the Trial Judge excluded his testimony *in toto*, saying he might be qualified to testify as to the paralysis but not as to its effect on the Testatrix's mental faculties (R. 101; Tr. 368, 369).

On the issue of fraud, withdrawn from the jury, and Petitioners' prayers on the presumptions of undue influence and testamentary incapacity, the following is most significant: (1) The testimony of Mrs. Metz (who, as attorney-in-fact and otherwise, occupied a confidential relationship to the Testatrix) that the Testatrix's reason for becoming "worried" and "dissatisfied" with Mrs. Adams was that the latter had led her to believe "all her money was gone and they were borrowing on her house" (R. 111), and, on cross examination, Mrs. Metz's admission that, after ascertaining that her aunt's belief that the extent of her property had been so greatly reduced was erroneous, *she failed to correct her aunt's wrong belief, and did not know that anyone had done so* (R. 139). (2) Mrs. Metz's position in the Testatrix's home, which afforded her the opportunity to exercise undue influence and fraud, and gave her an advantage over other prior legatees, left out of the will, who were absent and never apprized that a new will was to be executed. (3) The testimony of the witnesses Thomas and Allen (R. 48, 55), concerning questions

asked them by the Testatrix after Mrs. Adams left, from which no other inference could be drawn than that the Testatrix never ordered or knew about the discharge of Mrs. Adams, and was grieving over the separation from her. (4) The fact, *testified to by Mrs. Metz alone,* that the Testatrix asked her to discharge, and did not herself discharge, Mrs. Adams (living under the same roof), together with the further fact, testified to by the Respondents, that the Testatrix was a woman of strong character who did not want her relatives or anyone else to meddle in her affairs (R. 107, 109, 117; Tr. 380). (5) The fact that the Testatrix, while desperately ill, discharged the person most familiar with her affairs; and, further, in order to deprive that person of a share of her estate (as must be inferred from the Respondents' testimony), and without awaiting full recovery from that serious illness, exerted herself about preparations for and execution of a new will—by the roundabout method of enlisting the aid of Dr. Hawfield and Nurse Scott and having it drafted by a strange lawyer (R. 119)—when her purpose could have been effected simply and less arduously by destroying the 1939 codicil and 1941 will, available to her, *though not to the Respondents,* through her bank. (6) The fact that three prior wills, covering a period of some thirteen years —two executed when she was in good health and concededly mentally competent, and the third in the early days of her invalidism—reveal a fixed and definite plan and desire as to the distribution of her property among her relatives, from which the contested will radically departs. (7) The fact that in 1940 (R. 131, 132), when paralysis first struck the Testatrix, Mrs. Metz took steps toward securing a power of attorney and obtaining the same control over the Testatrix and her finances she effected by the power of attorney of 1944, but was prevented from doing so then by the Testatrix herself, then in a better condition

to assert herself (Tr. 380); (8) The testimony of Mrs. Metz and Nurse Scott, that they were not at the Testatrix's home the day the will was executed, but were there the previous day (R. 117, 142, 143, 146, 147), and their further testimony that they did not know when the will was executed (R. 142, 146). (9) The fact that both Mrs. Metz and Dr. Hawfield had tried, unsuccessfully, to get a Mrs. Adkinson to let her name be inserted as attorney-in-fact in the 1944 power of attorney (R. 133, 154).

Most significant, too, is the chronological sequence of the events beginning about the time of the incipience of the Testatrix's serious illness in March, 1944, and when her death was considered imminent (R. 60), and culminating with the execution of the will: Dr. Hawfield contacted Mr. Brick, whom he knew (R. 160), about drawing the will (R. 156). On March 20th Mrs. Metz dismissed Mrs. Adams and the next day evicted her from the Testatrix's home. On March 31st the power of attorney to Mrs. Metz, prepared by her attorney, was executed. Early in April, "after the power of attorney was fixed up" (R. 140), Mrs. Metz (having overheard her aunt tell Nurse Scott she wanted to make a new will) proceeded with Nurse Scott to Mr. Brick's office, where Nurse Scott conveyed the Testatrix's wish to Mr. Brick and Mrs. Metz asked Nurse Scott: "Did she say it of her own free will?" (or "accord") (R. 117, 126). In this connection, Nurse Scott testified she had never talked to anyone but Mrs. Metz about the will (R. 148) and said nothing about having ever been in Mr. Brick's office; and while Mrs. Metz testified that, on that occasion, she had, at Mr. Brick's direction, telephoned Dr. Hawfield about the will (R. 117, 126), Dr. Hawfield testified he had never talked to Mrs. Metz about the will (R. 164).

On April 4th Mrs. Metz wrote a letter to Mrs. Pollard, at the latter's home near Lynchburg, Virginia (R. 129) ask-

ing her to come to Mrs. Metz's home to take care of Mrs. Metz's dying father (R. 120), so that Mrs. Metz could stay at the Testatrix's home "*until things are settled*", and stating she had also written to Miss Harvey. On April 6th Miss Harvey and Mrs. Pollard arrived at the Testatrix's home and were received by Mrs. Metz; who mentioned that, because of changes being made in the household, a new will would have to be made for the Testatrix (R. 87), and who, while permitting Miss Harvey to see the Testatrix that evening, did not allow Mrs. Pollard to visit her until the next morning, and for only five minutes (R. 85, 115, 127). About the date of execution of the will, Mrs. Pollard heard Mrs. Metz tell someone, over the telephone from Mrs. Metz's home, that she wasn't coming, but she wanted to be included in the will and desired that Nurse Scott be also remembered (R. 89, 90, 92); Mrs. Pollard further testifying that Mrs. Metz, upon turning from the telephone and observing her, said that "Scott" had called, and the doctor and the lawyer were drawing the Testatrix's will (R. 92). *This conversation was not explained by Mrs. Metz on the stand, but positively denied* (R. 116, 121).

The testimony of Mrs. Metz, Dr. Hawfield and Nurse Scott, taken together, comprises such inconsistencies, contradictions and improbabilities as to raise no other reasonable inference than that the Testatrix never expressed or entertained a desire to make a new will, and the contested paper embodied the wishes of those Respondents and was the result of their joint activities. And the verdict of the jury, in view of the evidence, leads to the conclusion that they were misled by the Trial Judge's charge and the argument of Respondents' counsel (Tr. 614, 627) into weighing the relative interests of the Petitioners and Respondents in prior wills and deciding the question on that basis, rather than to decide the sole question before them: *Was it the*

will of Mary Elizabeth Ellyson? And that, being unable to determine the merits of the controversy, they solved their difficulty by bringing in a verdict maintaining the *status quo.*

Although not all the wills were read to the jury, and, as the Trial Judge stated they could not have grasped their full import if they had been, without further study, he refused to permit them to take any of the exhibits to the jury room (R. 43, 175), notwithstanding the fixed plan of the Testatrix evidenced by the prior wills.

On their appeal to the Circuit Court, the Petitioners assigned as errors, and argued, the following: I. Denial of their Prayers Nos. 2 and 7 on the presumptions of undue influence and testamentary incapacity, respectively. II. Direction of a verdict on the issue of fraud. III. Disqualification as an expert and exclusion of the testimony of Dr. Snyder. IV. The Trial Judge's ruling that Nurses Scott and Edwards were not competent to testify to the nature of the disease from which the Testatrix was suffering on the date of the will (R. 99, 143). V. That the verdict was contrary to the weight of the evidence and the law. VI. That the trial judge misled and confused the jury by an inadequate, and, in parts, ambiguous charge (R. 167-175). VII. The exclusion by the Trial Judge of testimony and other evidence, material, relevant and pertinent to Petitioners' case, in: (1) Prohibiting Respondents' counsel from: (a) Inquiring into the facts and circumstances surrounding the procurement and execution of the power of attorney of March 31, 1944 (R. 37, 79-83, 112-115, 120, 123, 124, 137, 138, 149, 159, 160); (b) Putting into evidence and examining into the facts concerning the account of the Testatrix with the Bank (R. 79-83, 149, 164, 165); (c) Putting into evidence and inquiring into the facts surrounding

certain checks endorsed in the name of the Testatrix and her estate by Mrs. Metz. (2) The exclusion of certain testimony of the witnesses Adams (R. 42), Thomas (R. 50, 51), Olson (R. 53), Allen (R. 55, 56, 58), Miles (R. 62, 63), Day (R. 64-66, 68-70, 73-75), Hall (R. 81-84), Pollard (R. 86, 91), and Dowdy (R. 93-95). VIII. That Petitioners were deprived of the right to cross-examine properly and fully the witnesses Edwards (R. 36, 37), Miss Harvey (R. 108), Metz (R. 120, 123, 124, 127, 128, 130, 131), Scott (R. 147), and Dr. Hawfield (R. 160, 161). IX. Other errors of the Trial Judge, in: (a) Refusing to withdraw a juror and declare a mistrial (R. 161); (b) Failing to take proper action concerning improper argument of Respondents' counsel objected to by Petitioners' counsel (R. 166); (c) Making comments prejudicial to Petitioners in front of the jury. That due attestation of the will was not proved, in that the attesting witnesses did not testify they signed in the presence of the Testatrix. That by the Trial Judge's conduct of the case the Petitioners were prevented from fully developing their case and deprived of a fair and impartial trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. A., Section 347; and Rule 38 of this Court.

Questions Presented.

I. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in denying Petitioners' Prayers Nos. 2 and 7, on the presumptions of fact of undue influence and testamentary incapacity, respectively (R.

18-22, 187, 188); and in ruling also that this point could not be urged on appeal because Petitioners had taken no exception to the Trial Judge's charge on the issues of undue influence and testamentary capacity (R. 188).

II. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in directing a verdict on Issue No. 3 (Fraud and Deceit—R. 188); and in confining its examination of the record, upon this point, to only "*the portions of the evidence*" specifically called to its attention by Petitioners.

III. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in disqualifying as an expert on mental capacity, and excluding the testimony of, Dr. Luther H. Snyder, a physician; and in holding, on this point, that a trial judge has the same discretion in determining the competency of a physician as an expert witness as he has in the case of a layman as such, and that the Trial Judge in the instant case did not abuse his discretion (R. 188, 189).

IV. Whether or not the Circuit Court erred in ruling that the Trial Judge's charge (R. 167-175) was not misleading and, in part, ambiguous, because couched in terms perhaps proper for a legal opinion, but tending to confuse a jury of various degrees of intelligence and education, as Petitioners contended; and in finding that the Trial Judge was, on the contrary, "extraordinarily careful in instructing the jury in the most elementary language" (R. 189).

V. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge erred in his exclusion of testimony and other evidence: (1) Excluding certain testimony of witnesses Mrs. Adams (R. 42); Thomas

(R. 50, 51); Olson (R. 53); Allen (R. 55, 56, 58); Miles (R. 62, 63); Day (R. 64, 65, 66, 68-75); Hall (R. 79-84); Pollard (R. 86, 91) and Dowdy (R. 93-95). (2) Prohibiting Petitioners' counsel from (a) inquiring into the facts and circumstances surrounding the procurement and execution of the power of attorney of March 31, 1944, from the Testatrix to Mrs. Metz; (b) putting into evidence and examining into the facts concerning the trust account of the Testatrix with the Bank; (c) putting into evidence and inquiring into the facts surrounding certain checks endorsed in the name of the Testatrix and her estate by Mrs. Metz (R. 37, 56, 71-73, 78-83, 97-99, 112-115, 119-124, 133-138, 140, 149, 154, 159, 160, 164, 165).

VI. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge erred in his limitations and curtailment of cross examination, and deprived Petitioners of their fundamental right to properly and fully cross-examine the witnesses Nurse Edwards (R. 36, 37), Miss Harvey (R. 108), Mrs. Metz (R. 120, 123, 124, 127, 128, 130, 131), Nurse Scott (R. 147) and Dr. Hawfield (R. 160, 161).

VII. Whether or not the Circuit Court erred in failing to rule specifically upon the point, and in failing to find that the Trial Judge erred in prohibiting the Nurses Scott and Edwards from testifying as to the nature of the disease from which the Testatrix was suffering in March and April of 1944 (R. 99, 143).

VIII. Whether or not the Circuit Court erred in failing to find that the Trial Judge denied Petitioners a fair and impartial trial in (1) telling the jury why Dr. Hawfield could not testify as a physician (R. 150); (2) refusing to withdraw a juror and declare a mistrial after criticizing Petitioners' counsel in the presence of the jury (R. 161);

(3) failing to take proper preventative measures when Respondents' counsel testified in his closing argument (R. 166); (4) assuming the role of counsel for Respondents (R. 37, 41, 42, 62, 65, 83, 120, 121, 123, 125, 131, 161, 163; Tr. 109, 110, 165, 324); (5) reprimanding counsel for Petitioners in the presence of the jury (Tr. 324) during the trial, and for characterizing the testimony of witnesses in his closing argument (Tr. 663); (6) denying Petitioners' motion for a new trial summarily, and the request of their counsel for an oral hearing thereof in order to present newly-discovered law (R. 27).

IX. Whether or not the Circuit Court erred in failing to find that due attestation of the will was not proved (R. 189).

X. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge denied Petitioners a fair trial and due process of law.

XI. Whether or not the Circuit Court, in affirming the judgment of the Trial Court, sanctioned such a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

XII. Whether or not the Circuit Court's opinion, in form and substance, is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Reasons Relied on for Allowance of Writ.

I. In ruling on Petitioners' contention that the Trial Judge erroneously denied Petitioners' Prayers Nos. 2 and 7, on the presumptions of undue influence and testamentary incapacity, respectively, the Circuit Court's opin-

ion states that, whether or not the prayers correctly stated the law, it was not error to deny them, because, in his charge, the Trial Judge correctly stated the law on *the issues of "undue influence and testamentary capacity"* (R. 187). This ruling must mean either that the Circuit Court now holds that in this jurisdiction the uncontradicted facts of record such as have been previously held here, and are generally held elsewhere, to raise such presumptions, do not raise them; or else that the presumptions *were raised,* but the Trial Judge's charge covered them. Under either interpretation of the ruling, the Circuit Court is in error, and thus the ruling calls for the exercise of this Court's supervisory authority over the lower Federal Courts. If the ruling is construed to hold that the Trial Judge did not err in denying these prayers and failing to instruct the jury in line with them, it is in conflict with decisions of this Court, with prior decisions of that Court, and decisions of other Circuit Courts; and contrary to the great weight of opinion of recognized text-writers and the decisions of State Courts.

(1) Prayer No. 2 (R. 18-20): Petitioners' contention that, under the special uncontradicted facts, conditions and circumstances of record, a presumption that undue influence was exerted upon the Testatrix by Mrs. Metz and Nurse Scott, that the jury should have been so instructed, and that the Trial Judge erred in denying this prayer, is supported by: *Hagerty v. Olmstead, supra; Barbour v. Moore,* 4 App. D. C. 550, and 10 App. D. C. 30; *McMillan v. Knost,* 75 U. S. App. D. C. 26, 126 F. 2d 235; *Towson v. Moore,* 11 App. D. C. 377, and 173 U. S. 17; *Mackall v. Mackall,* 135 U. S. 167; *Conley v. Nailor,* 118 U. S. 127; *Shapiro v. Rubens* (C. C. A.-7, 1948), 166 F. 2d 659; 57 *Am. Jur.,* Secs. 371, 386, 387, 389, 390, 392, pp. 270, 271, 279, 280, 281, 283; 28 L. R. A. (NS 1910), 272 *et seq.;* 66

A. L. R., 228 *et seq.;* 154 A. L. R., 573 *et seq.* The facts set out in the opinion (R. 186), moreover, describe Mrs. Metz merely as "*a niece of the testatrix and one of present appellees,*" omitting the further material, uncontradicted facts bearing on this presumption, that Mrs. Metz was also a substantial legatee in the will; had full control of the Testatrix's person and finances by virtue of a power of attorney constituting her attorney-in-fact (and so unquestionably held a position of confidential relationship—R. 191-201); her attorney drew the will; and she was active in its procurement.

(2) Prayer No. 7 (R. 21, 22): The Trial Judge's denial of this prayer, and his failure to instruct the jury according to its tenor, is contrary to established law that, where a continuing condition is shown to exist, it is presumed to continue until the contrary is shown to the satisfaction of the jury. There was testimony by several disinterested witnesses that the Testatrix was incompetent to transact business immediately before and after the date of execution of the will. If the Circuit Court's ruling means that the Trial Judge committed no error in denying this prayer, the ruling is in conflict with the ruling of this Court in *Ralston v. Turpin, supra,* cited in *Doyle v. Rody,* appearing at the bottom of the prayer; also, *Mt. Vernon Hotel Co.* v. *Black,* 157 F. 2d 637; 31 C. J. S., Secs. 124, pp. 736 *et seq.,* and 68 C. J. Sec. 455, p. 764; 28 L. R. A. (NS 1910), 270 *et seq.* Cf. MacCartney case, cited in Circuit Court's opinion, and *Thomas v. Young,* 57 App. D. C. 282. As to *Doyle v. Rody, supra,* a Maryland case, Maryland law on probate proceedings and practice has always been considered controlling in the District of Columbia. *Pascucci v. Alsop* (1945), 79 U. S. App. D. C. 354; *Clawans v. Sheetz,* 67 App. D. C. 366, 92 F. 2d 517. Cf. *Redford v. Booker,* 185 S. E. 879 (1936).

(3) If the statement in the Circuit Court's ruling on the prayers, that "the ultimate charge properly informed the jury as to the law * * * *on these points*" (R. 188), means that the charge informed the jury as to these presumptions, here, too, the Circuit Court is in error; because nowhere in the Trial Judge's charge are there any instructions on these presumptions. Hence, the *MacCartney* case does not support this ruling. That case, however, does support Petitioners on many points.

(4) On the prayers, the Circuit Court's opinion further states that, since no exceptions were taken by Petitioners to the Trial Judge's charge, they could not urge their contentions concerning these prayers before that Court. As the record shows, the typed prayers, with appended authorities, were submitted and argued at the bench, and denied, prior to final arguments of counsel and the charging of the jury. It must be assumed that the Circuit Court had in mind Rule 51 (FRCP); and so this ruling is directly in conflict with recent, applicable decisions of the 6th and 8th Federal Circuits (R. 201, 202), namely: *Williams v. Powers* (C.C.A-6,1943), 135 F. 2d 153; and *Hower v. Roberts* (C. C. A.-8, 1946), 153 F. 2d 726, citing the Williams case. Both cases hold that Rules 46 and 51 (FRCP) should be read together, and that if the points urged were called to the attention of the Trial Judge, that is sufficient, and no exceptions or objections are required. Cf. *Hormel v. Helvering*, 312 U. S. 552, wherein, at p. 557, this Court said: "*Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.*" This Circuit Court now being on the same basis as other Federal Circuit Courts, the conflicting rulings of these Circuit Courts on the construction and application of these highly important Federal rules of civil procedure, governing exceptions and objections, raise a question which this

Court should decide, in the interest of securing uniformity throughout the Circuits thereon; *particularly so, since Rule 46 marks a radical change from long-established rules making exceptions and objections obligatory.* In *Hickman v. Taylor*, 329 U. S. 459, this Court took jurisdiction to construe the Federal rules governing discovery.

II. The Circuit Court erred in ruling that the Trial Judge properly directed a verdict on the issue of fraud and deceit (R. 188). Under the facts in this case, this ruling is contrary to well-established law. In effect, it approves the denial to Petitioners of their fundamental right to trial by jury on this issue. Moreover, the Trial Judge, in withdrawing this issue from the jury, deprived Petitioners of a fair trial and due process of law; and the Circuit Court's ruling sanctioning the Trial Court's action calls for the exercise of this Court's power of supervision over the lower Federal Courts. In directing a verdict, the Trial Judge here passed on all facts and circumstantial evidence, and the inferences properly to be drawn therefrom, and the weight thereof. This, under law, he could not do. Not only was there substantial evidence of fraud, as is specifically pointed out in Petitioners' Statement, but there was a combination of special uncontradicted facts and circumstances which raised a presumption of fraud. Hence, it was an issue for the jury under a proper charge, according to applicable law. *Too, under the special facts, the issues of fraud and undue influence could not be separated. If either issue went to the jury, the other could not be withdrawn.* The facts which bore on undue influence, and raised a presumption of undue influence, were of a fraudulent character, and hence pointed as strongly to fraud and a presumption of fraud. *Duckett v. Duckett*, 134 F. 2d 527, 77 U. S. App. D. C. 303; *Frene v. Muratori*, 142 F. 2d 768; *Hagerty v. Olmstead, Towson v.*

Moore, McMillan v. Knost, Barbour v. Moore, Conley v. Nailor, Mackall v. Mackall, supra; 57 *Am. Jur.*, Secs. 386, 387, p. 279; 28 L. R. A. (N. S. 1910), 274, 275, 279 *et seq.*; 66 A. L. R., 228 *et seq.*; 154 A. L. R., 573 *et seq.*

The presumption of fraud, too, as well as the presumptions of undue influence and testamentary incapacity, was a presumption of fact; and when these presumptions were raised by the evidence, the burden was thrown upon the Respondents of overcoming them by showing, to the satisfaction of the jury, by clear and convincing evidence, that the Testatrix had testamentary capacity when she executed the will, and that no fraud or undue influence were exercised upon her; that no undue advantage was taken of her; that she exercised understanding and judgment when she revoked all prior testamentary papers and eliminated from a share in her estate some ~~[illegible]~~ beneficiaries previously named (representing the various branches of her family), and, for no reason shown, divided her estate among three (representing two branches). The Trial Court, therefore, erred in instructing the jury (R. 171) that the burden of proof throughout was on the Petitioners.

The recognized test as to the right of a Trial Judge to direct a verdict is: If the issue had been submitted to the jury, under a proper charge, and they had brought in a verdict on it for the Petitioners, would it have been the duty of the Trial Judge, after considering all the facts and the inferences to be gleaned from circumstantial evidence in the light most favorable to Petitioners, to set the verdict aside?

On this point, the Circuit Court said further, that "the trial judge has decided and we agree, after consideration of *all the portions of the evidence* called to our attention

by appellants, that there was no evidence of fraud sufficient to justify submission of that issue to the jury." Since the phrase "*portions of the evidence*" must refer to facts emphasized in Petitioners' brief to the Circuit Court as pointing to fraud, it appears that that Court did not read *the entire record*, as the law mandatorily requires be done, before ruling on this issue. *28 U. S. C. A. 391.* In the *MacCartney* case, *supra*, it is said that *the record was carefully read;* most opinions on the direction of a verdict so state; and the law is construed in *Banning v. U. S.* (C. C. A.-6, 1942), 130 F. 2d 330 (Cert. den. 317 U. S. 695); *Beyer v. LeFevre*, 186 U. S. 114; *McCandless v. U. S.*, 298 U. S. 342.

Cf. *Shapiro v. Rubens, supra; Worcester v. Pure Torpedo Co.*, 140 F. 2d 358; *Irish v. Central Vt. Ry., Inc.* (C. C. A.-2, 1947), 164 F. 2d 837; *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Ralston v. Turpin, supra; Railway Express Co. v. Mallory*, 168 F. 2d 426; *Katz v. Del. H. & R. Corp., supra; Scott v. U. S.* (C. C. A.-6, 1947), 161 F. 2d 1009; *Lumbra v. U. S.* (1933), 290 U. S. 550; *Albany Ins. Co. v. Halberg* (C. C. A.-8), 166 F. 2d 311; *Wash. Term. Co. v. Martin*, 167 F. 2d 762; *Kemper v. Churchill*, 8 Wall. 362; *Bowden v. Johnson*, 107 U. S. 251; *The Struggle v. U. S.*, 9 Cranch. 71; *Clark's Exrs. v. Reinsdyk*, 9 Cranch. 153; *The Robert Edwards*, 6 Wheat. 187; *La Nareyda*, 8 Wheat. 108; *Obold v. Obold*, 82 U. S. App. D. C. 268, 163 F. 2d 32.

It is submitted that the circumstantial evidence in this case, coupled with the special combination of circumstances and uncontradicted facts, speaks louder and more convincingly than the testimony of interested witnesses to prove that fraud was exercised to effect the execution of the will. As far back as John Marshall's day this was recognized where fraud was concerned.

The *MacCartney* case, cited in the Circuit Court's opinion to support its conclusions, is not applicable for the purpose, but strongly supports Petitioners. For that case definitely holds that a trial judge has no power to weigh evidence; that the weight of all facts and circumstantial evidence, and the inferences to be derived therefrom, is a matter for the jury's determination. The Circuit Court erred, therefore, in not ruling that the issue of fraud should have been submitted to the jury, under proper instructions as to the law applicable to the particular facts. *Thompson v. Smith*, 103 F. 2d 936, 28 A. L. R. 790; *Mut. Res. Life Ins. Co. v. Heidel* (C. C. A.-8, 1948), 161 F. 2d 533; *Kansas City Southern Co. v. Albers*, 223 U. S. 573; *Hennister v. Starnthrop*, 2 Wall. 106; 31 C. J. S., Sec. 127, p. 747. The Circuit Court's ruling on this point is also in conflict with the following decisions: *Md. Cas. Co. v. Hosmer* (C. C. A., Mass., 1938), 93 F. 2d 365; *Equit. Life Ins. Co. v. Guion* (C. C. A., Neb., 1937), 86 F. 2d 865; *Flynn v. Crume*, 101 F. 2d 661; *A & P Tea Co. v. Robards*, 161 F. 2d 929. Cf. *Heatherly v. Southern Ry. Co.* (C. C. A.-5, 1939), 106 F. 2d 894; *McGraw & Co. v. Milcor Steel Co.* (C. C. A.-2, 1945), 149 F. 2d 301; *Robins v. Pitcairn* (C. C. A., Ill., 1942), 124 F. 2d 734; *Stansbury v. Travelers Prot. Assn.* (C. C. A., Tex., 1936), 80 F. 2d 997; *Scott v. U. S.* (C. C. A.-6, 1947), 161 F. 2d 1009.

III. In holding it to be a matter for the Trial Judge's discretion whether or not Dr. Snyder, a practicing physician, with experience in the treatment of paralysis cases, was qualified to give an expert opinion, in answer to a hypothetical question, as to the effect on the Testatrix's mental faculties of long-continued paralysis, extreme old age, and the toxemic condition produced by pneumonia (R. 99-101), and in ruling that the Trial Judge did not

abuse his discretion in disqualifying Dr. Snyder and excluding his testimony (R. 188, 189), the Circuit Court erred, and its ruling is in conflict with the great weight of opinion on the point, including the majority of State courts of last resort and recognized text-writers.

It is submitted that the question here raised is one of such general importance as to call for a decision by this Court: First, whether a trial court has discretion in such a situation as to the competency of a physician as an expert, or whether, in line with the majority view, he has no discretion, and should admit the testimony, leaving its weight, under proper instructions, to be determined by the jury. Second, if a trial judge has discretion in such case, whether in the instant case the Trial Judge abused his discretion. The Trial Judge's ruling here is in conflict with principles enunciated in *Hamilton v. U. S.*, 26 App. D. C. 382; *Conn. Mut. Life Ins. Co. v. Lathrop, supra; Mut. Ben. Health & Ac. Assn. v. Francois*, 148 F. 2d 590; *Boston Ins. Co. v. Read*, 166 F. 2d 551; *Beck v. Wing's Field* (C. C. A.-3, 1941), 122 F. 2d 114; *Leach v. Burr*, 188 U. S. 510; and with the views expressed in 39 L. R. A. 305 *et seq.*; *1 Clevenger Med. Jur.*, 546; 20 *Am. Jur.*, Secs. 785, 851, 864, 865, pp. 659, 713, 726, 727; 54 A. L. R. 863 (anno. to *Pridgen* case, which gives the general rule and cites in support the works on Evidence of Rogers, Lawson and Greenleaf); *3 Wigmore, Evidence* (3rd ed., 1940), Sec. 687, p. 3; Sec. 569, p. 665, where the author comments that the Massachusetts rule (in the minority class of about three States, including Maine), that a physician who is not a mental specialist may qualify as an expert only if he has had the person inquired about under his personal observation, is an "odd" rule; 32 C. J. S., Sec. 573, p. 266; *Doyle v. Rody, supra.*

The *Chessin* and *Hannan* cases, cited in the Circuit Court's opinion in support of its ruling on this point, have no application whatsoever to this situation. In those cases the witnesses offered as experts were not physicians or medical men, called to testify as experts on subjects within the purview of their education and experience, but laymen. It is conceded that in the case of a layman the trial judge has discretion to decide whether he has the superior knowledge on the particular subject to constitute him an expert.

It will be noted, also, that the Trial Judge here did not "limit" Dr. Snyder's testimony, as the opinion states, but excluded it *in toto*. And, while it is true that, at the trial, the Trial Judge asked for authority on the subject, which counsel at the time was unprepared to furnish, the record discloses (R. 26, 27) that when he summarily denied Petitioners' motion for a new trial, he also denied the request for an oral hearing, at which such authority, which counsel had obtained, could have been given him.

It is respectfully urged that this Court take cognizance of this question, for the fundamental reason that, where alienists or other so-called specialists on mental disorders enjoy a monopoly in this field their fees for testifying are so exorbitant as to be beyond the reach of litigants of moderate means.

IV. On Petitioners' contention that the Trial Judge's charge (R. 167-175) was inadequate, and also ambiguous because parts of it were "couched in terms proper for a legal opinion perhaps, but certainly not likely" to be understood by "every layman on the jury, of various degrees of intelligence and education," the Circuit Court found that the charge was proper and that "the trial judge was extraordinarily careful in instructing the jury in the most ele-

mentary language * * *." (R. 189). It is submitted that a charge taken almost literally from appellate decisions was improper, and that the charge in this case was too general in character, and also, in effect, the direction of a verdict for Respondents. A general charge is not sufficient; it must be fitted to the specific facts of the particular case. *Thompson v. Smith, supra; Coleman v. Heurich*, 2 Mackey (13 D. C.) 189; *Barbour v. Moore, Towson v. Moore, Mackall v. Mackall, supra; Cochrane v. U. S.*, 157 U. S. 286; *Coffin v. U. S.*, 156 U. S. 432; *Rea v. Missouri*, 84 U. S. (17 Wall.) 532.

It is submitted, further, that the jury could not possibly have received from the Trial Judge's charge the clear guidance and illumination necessary to enable them properly to draw a correct conclusion from the particular combination of special facts in this case. Inadequate directions to a jury which do not cover the law applicable to the specific facts of a case are fatal.

We submit that the Circuit Court's holding is in conflict with the following authorities: *Ralston v. Turpin, Doyle v. Rody, Conley v. Nailor, Barbour v. Moore* and *Shapiro v. Rubens, supra.* Cf. *Lauer's Est.*, 351 Pa. 438, 41 A. 2d 552; *In Re Bridle's Est.* (Sup. Ct. Pa., 1948), 60 A. 2d 1; *Pusey's Est.*, 321 Pa. 268; *Lane's Will*, 352 Pa. 323; *Woerner, Am. Law of Adm.* (3rd ed., 1923), Sec. 32, p. 63 *et seq.; Underhill, Law of Wills* (1900), Sec. 145, p. 207 *et seq.*; 207 *et seq.* 28 L. R. A. (NS 1910), 270 *et seq.*; 66 A. L. R., 228 *et seq.*; 154 A. L. R., 573 *et seq.*; 167 A. L. R., 1 *et seq.*; 57 *Am. Jur.*, Secs. 386, 387, p. 279 (majority opinion); also, Secs. 390, 392, pp. 281, 283 (as to activity, etc. in procuring execution of will). See, also, 28 A. L. R. 790 (anno.), *Dowell, Inc. v. Jowers* (CCA-5, 1948), 166 F. 2d 214; 31 C. J. S., Sec. 124, p. 736 *et seq.*; 68 C. J., Sec. 455

(prior wills); *Turner v. American Sec. & Tr. Co.* (1909), 213 U. S. 257; *Thomas v. Young*, 22 F. 2d 588; 57 App. D. C. 282.

V. On Petitioners' contentions that the Trial Judge excluded evidence and testimony material, pertinent and relevant to their case (R. 37, 42, 50-53, 55, 58, 62-75, 78-84, 86, 91, 93-95, 97-99, 112-115, 119-124, 133-137, 140, 149, 160, 164, 165), the Circuit Court declined to pass specifically sweeping aside these contentions and the equally important one that the Trial Court unduly and unreasonably restricted and curtailed them on cross examination, with the pronouncement (R. 189) that they were "without merit" and lacked "real substance". In thus restricting the evidence, the Trial Judge prevented Petitioners from fully and properly developing their case, and denied them their constitutional right to a fair trial and due process of law. And the Circuit Court, in ignoring these contentions, and in failing to hold that the Trial Judge erred in this respect, has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings, and so far itself departed therefrom, as to call for an exercise of this Court's power of supervision. The Trial Judge's rulings on these points were not only contrary to the rules governing the admission of evidence in ordinary civil cases, but particularly in conflict with applicable decisions governing will cases. It is universally held that in a will contest the greatest latitude should be exercised by the trial judge in the admission of evidence, for the reason that such a case is in the nature of an inquiry to determine the wishes of the one who would be best able to testify thereto were his lips not sealed in death.

The blanket ruling of the Circuit Court holding to be correct the rulings of the Trial Judge excluding certain evidence, objected to under specific points raised by Peti-

tioners, is in conflict with *Olmstead v. Webb*, 5 App. D. C. 38 (and cases cited therein); *Hagerty v. Olmstead, Barbour v. Moore, Towson v. Moore, supra; Wilson v. Beckett*, 103 F. 2d 19, 79 U. S. App. D. C. 94; Rule 43 (FRCP); *Hyland v. Miller Natl. Ins. Co.*, 58 F. 2d 1003; *Majestic v. L. & N. R. Co.* (CCA, Tenn., 1945), 147 F. 2d 621; *Manourikos v. Vardianos*, 169 F. 2d 53; *Holmes v. Goldsmith*, 147 U. S. 150; *Wood v. U. S.*, 16 Pet. 342; *Thieda v. Utah*, 159 U. S. 510; *Castle v. Bullard*, 23 How. 172; *Hoffman v. Palmer*, 129 F. 2d 976; *Worthington v. U. S.* (1933), 64 F. 2d 936; *Rea v. Missouri, supra; Ormsby v. Webb*, 134 U. S. 47; *Tombigbee Lbr. Co. v. Hollingsworth*, 162 F. 2d 763; *Boosalis v. Crawford, Obold v. Obold, Clawans v. Sheetz, Pascucci v. Alsop, Mackall v. Mackall, Wilson v. Beckett, supra; Owl Creek Coal Co. v. Golcb* (CCA-8, 1914), 210 F. 2d 209; *Garrison v. U. S.*, 62 F. 2d 41; *Miller v. Continental Shipbuilding Corp.*, 265 F. 2d 158; *Alderman v. U. S.*, 31 F. 2d 499, Cf. *Lavengood v. Lavengood*, 73 N. E. 2d 685; *In Re Lomax's Will*, 39 S. E. 2d 388, 226 N. C. 498; *In Re Lewis's Estate;* 149 P. 2d [illegible]; *In Re George's Estate*, 15 N. W. 2d 80; *In Re Hampton's Estate*, 131 P. 2d 565; *In Re Wolleb's Estate*, 132 P. 2d 864; *In Re Perry's Estate*, 181 P. 2d 783; *In Re Bucher's Estate*, 120 P. 2d 44.

VI. The Trial Judge denied Petitioners their constitutional right to a fair trial in refusing to allow them to fully, adequately and reasonably cross-examine the Respondents and their witness Nurse Edwards (R. 36, 37, 108, 120, 123-131, 147, 160, 161). The Circuit Court, in its blanket statement holding Petitioners' contentions which included this point to be without merit, is in conflict with applicable decisions not only of that Court, but of other Circuit Courts and this Court. See *Radio Cab, Inc., v. Houser* (1942), 128 F. 2d 604, 76 U. S. App. D. C. 35; *Hanger, Inc., v. U. S.*, 160 F. 2d 8; *Rea v. Missouri, supra; Alford v. U. S.*, 282

U. S. 687; *Kroger Groc. & Bkg. Co. v. Stewart,* 164 F. 2d 884; *Lindsay v. U. S.,* 133 F. 2d 368, 77 U. S. App. D. C. 1; *Heard v. U. S.,* 255 F. 289; *Cossack v. U. S.,* 63 F. 2d 511; *Hyland v. Miller Ins. Co., supra; Gerber v. U. S.,* 145 F. 2d 966; *Miner v. U. S.,* 57 F. 2d 506; *Sunderland v. U. S., Banning v. U. S., supra; Cleveland v. Peters* (1947), 73 F. S. 769; *U. S. v. Edmonds,* 63 F. S. 968 (citing Alford case); *Majestic v. L & N. R. Co., supra; Zumwalt v. Gardner,* (CCA-8, 1947), 160 F. 2d 298.

The *Lindsay, Cossack* and *Hanger* cases, *supra,* hold that full cross examinations must be allowed on subjects of direct examination, and that not to do so is prejudicial error. See, also, *Miller v. Continental Shipbuilding Corp.; Aldermen v. U. S.;* 70 C. J. 828, p. 669 *et seq.* The Respondents Harvey, Metz, Scott and Hawfield offered themselves as their own witnesses; yet the Trial Judge narrowly restricted Petitioners' counsel in cross-examining even these witnesses. The law is that even greater than ordinary latitude should be allowed in the cross examination of a party taking the stand in his own behalf. *Rea v. Missouri* and *Kroger Groc. & Bkg. Co. v. Stewart, supra.* Cf. *People v. Callop,* (1945), 161 P. 2d 576.

VII. In its blanket ruling, the Circuit Court held to be without merit Petitioners' contention that the Trial Judge erred in ruling that Nurses Scott and Edwards could not testify as to the nature of the disease from which the Testatrix was suffering in March and April, 1944 (R. 99, 143). This ruling is in conflict with applicable decisions of that Court and other Circuit Courts. *Southwest Metals Co. v. Gomez,* 4 F. 2d 215; *First Tr. Co. of St. Paul v. K. C. Life Ins. Co.,* 79 F. 2d 148; *Eureka-Md. Assur. Co. v. Gray,* 74 App. D. C. 191, 121 F. 2d 104. Cf. *Prudential Ins. Co. v. Kozlowski,* 276 N. W. 300, in which there is a full discus-

sion, pro and con, of the subject matter, and in which the Federal rule is followed. Regardless of the question of privilege, moreover, these nurses or anyone else who heard Dr. Hawfield diagnose the disease could testify as to his diagnosis, since such testimony was not hearsay. Dr. Hawfield was a defendant in this case. His diagnosis of the disease as pneumonia was admissible, moreover, on the ground that it was against interest, since it tended to impeach his testimony as to the mental alertness of the Testatrix at the date of the execution of the will (R. 153, 155, 164). See 20 *Am. Jur.* (Evidence), Sec. 454; 104 A. L. R. 1130 (anno.); *Davis v. Calvert*, 5 G. & J. (Md.), 269 (cited *in Olmstead v. Webb, supra). Cf. Spitler v. Atchinson, T. & S. F. R. Co.*, 253 U. S. 117.

VIII. Even a casual examination of the record discloses the following additional support for Petitioners' contention that they were denied a fair and impartial trial: (1) With no protective measures taken by the Trial Judge upon objection by Petitioners' counsel, other than the admonition to confine himself to the evidence, Respondents' counsel testified in his own behalf in his argument to the jury (R. 166) (*Katz v. Del. H. & R. Corp., supra*). (2) The Trial Judge frequently assumed the role of counsel for the Respondents and excluded questions and answers to which Respondents' counsel made no objection. He made many remarks prejudicial to Petitioners before the jury, and displayed bias and prejudice against Petitioners throughout the trial. He made a statement to the jury as to why Dr. Hawfield could not testify professionally (R. 150). (3) He refused Petitioners' request that the jury be permitted to take the exhibits to the jury-room with them to aid them in their deliberations. (4) He refused to allow caveators' two counsel (who did not represent the same caveators) more than one hour between them for argu-

ment, in which to cover the large amount of evidence developed in five full days of trial (some 700 pp. of transcript). See 53 *Am. Jur.* (Trial), Secs. 74, 76, 93, pp. 73, 75, 84; 3 *Am. Jur.*, Secs. 926, 1073, pp. 493, 613; *Sprinkle v. Davis*, 111 F. 2d 1925, 128 A. L. R. 1101 (Cert. den. 314 U. S. 647). Cf. *Pittsburgh Steamboat Co. v. National Labor Relations Bd.* (CCA-6, 1948), 167 F. 2d 126; *Mutual Reserve Life Ins. Co. v. Heidel, supra; Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U. S. 292; *Sulzberger v. Continental Cas. Co.* (CCA, Mo. 1937), 88 F. 2d 122; *Whittaker v. McLean* (1941), 73 App. D. C. 259; *U. S. v. New York, N. H. & H. R. R.*, 165 F. 742; *Sunderland v. U. S., Beck v. Wing's Field, Kroger Groc. & Bkg. Co. v. Stewart, Alford v. U. S., Cochrane v. U. S., Coffin v. U. S., supra; Hurtado v. Cal.*, 110 U. S. 516 (Citing *Brown v. N. J.*, 175 U. S. 172); *DiBona v. Phila. Transp. Co.*, 356 Pa. 204.

IX. The decision of the Circuit Court in finding and holding that the Trial Judge was right in his rulings, in the conduct of the case, and that there were no prejudicial errors committed, involves most important and far-reaching questions in will cases, and it is submitted that, in the interest of justice and under its broad supervisory powers, this Court should settle the questions raised. The findings and holdings in the opinion of the Circuit Court are not only in conflict with the decisions of other Circuit Courts and of this Court, but also directly contrary to rulings of the great majority of State courts involving will contests.

Prayer for Writ.

WHEREFORE, the Petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, District of Columbia Circuit, commanding that Court to certify and

send to this Court for its review and determination a full and complete transcript of all the proceedings in the cause entered on its docket as No. 9635, entitled Ethel Ellyson Pollard et al. v. Clayton Hawfield et al.; that the said Judgment of the United States Court of Appeals (District of Columbia Circuit) may be reviewed and reversed by this Honorable Court; and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

LUTHER ROBINSON MADDOX,
1032 Woodward Building,
Washington 5, D. C.,

Attorney for Petitioners.

FILE COPY

PETITIONERS' REPLY BRIEF.

FILED

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 488.

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, et al.,

Petitioners,

v.

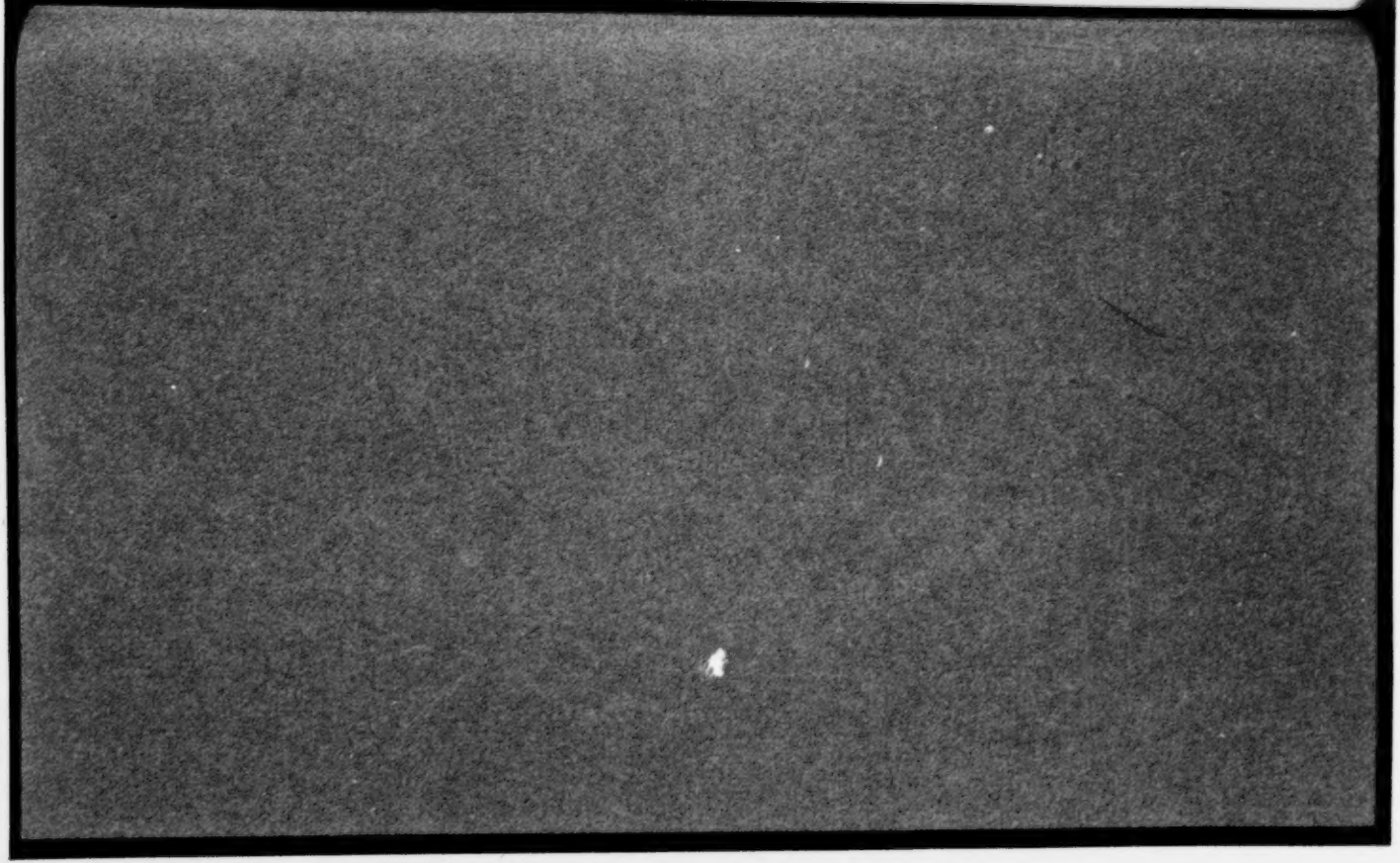
CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LUTHER ROBINSON MADDOX,
Attorney for Petitioners.

MARIE PAYNE MADDOX,
Of Counsel.



IN THE

Supreme Court of the United States

October Term, 1948.

No. 450.

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,

Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents devote the first two paragraphs of their brief, as they did in their brief to the Circuit Court, to showing the relative interests of Petitioners and Respondents in prior wills of the Testatrix. It is respectfully submitted that these are facts with which this Court could not be concerned; that whatever bearing they may have on the motives of the Petitioners in contesting the will, or the benefits that might or might not accrue to them if it were set aside, is beside the point; the sole question involved in this case being whether or not the contested will was that of the Testatrix, Mary Elizabeth Ellyson. It should be observed, however, that not only were three of the contestants men-

tioned in former wills eliminated from the contested paper, but the following relatives, consistently named in all the prior wills (or one or more of their parents while living), were also left out: Louise Price and Elizabeth Moore (daughters of deceased niece of Testatrix); William L. Browning, Bond J. Browning and Hilda Olson (children of deceased niece); Conway Owen, nephew of Testatrix.

Respondents' opposition brief is, almost verbatim, a second edition of the brief filed by them, as appellees, in the Circuit Court; with some minor changes necessitated by the change in courts and in the titles of the parties; some argument adapted from the Circuit Court's opinion; and the statement, on p. 5, that no question of general importance nor one of substance relating to the construction or application of the Constitution is presented to this Court, and that the Trial Court did not fail to give proper effect to any decision of this Court. Except for the statement last mentioned (which the facts do not support), there is no proper argument in Respondents' brief, Petitioners submit, against the granting of the writ.

The cases cited and quoted from in Respondents' brief are taken *in toto* from their Circuit Court brief. It was, and still is, the view of Petitioners that none of those cases are applicable to or support materially or substantially Respondents' position (as disclosed by the record in this Court), and that the great majority of them pointedly support Petitioners on various questions raised; and for this reason Petitioners did not reply to the almost identical brief filed by Respondents in the Circuit Court. Petitioners, therefore, would not now encroach upon the time of this Court with a reply brief, were it not that Respondents' brief contains certain outstanding misstatements of material facts.

Analysis of Respondents' Counter-Statement of Case.

On p. 2 of their brief Respondents (referring to R. 126) state that Fontaine Hall (the Trust Officer of the Testatrix's Bank, which supervised the drawing and execution of all the prior testamentary papers) was notified to see the Testatrix about the execution of a new will, but failed to do so. The testimony of Mrs. Metz referred to is that Mrs. Adams had told her that she (Mrs. Adams) had unsuccessfully tried to get Fontaine Hall to see the Testatrix about drawing a *power of attorney—not a will*—apparently for Mrs. Adams. The entire original record in this case was brought up and is now before this Court. And nowhere therein, or in the appendixes, will there be found evidence of any attempt to contact the Bank about the new will; although the record does show, as pointed out in the petition, that several opportunities were afforded the Respondents Mrs. Metz and Nurse Scott, and Mrs. Metz's attorney, to do so before the will was drafted.

Also on p. 2 of their brief, the statement of Nurse Edwards (R. 35) that *"at that time"* the Testatrix had pneumonia, is construed by Respondents to mean the time when, *some years before the date of the contested will*, the Testatrix suffered the cerebral hemorrhage which caused her paralysis; and this in the face of the further testimony of Nurse Edwards (Tr. 91, 92; R. 36) unequivocally stating that the Testatrix had the spell of pneumonia during the period in 1944 when the witness served as *special nurse for her*—from March 18th to about the end of April—and had not recovered from the attack when Nurse Edwards terminated her employment. The will is dated April 14, 1944.

In some four paragraphs appearing on pp. 2 and 3 of their brief, Respondents essay to show by the record that the attesting witnesses signed in the presence of the Testatrix

and thus complied with the mandatory requirement of the statute that they so sign. But neither in these paragraphs nor in the record does this fact definitely appear. The most that is indicated is that the attesting witnesses were "*in the room*" (perhaps the rear room of the connecting double parlors, in the front room of which, Mrs. Metz testified (R. 115, 140, 141), the Testatrix lay in her bed) and *saw the Testatrix sign*, and that they *afterwards signed in the presence of one another*. There is no evidence whatever that the Testatrix requested them to attest her will, or saw them sign it, or even was ever aware of their presence or knew that they had signed. Hence, the record does not show that due attestation of the will was proven.

On p. 4 of their brief, Respondents say the record (R. 118) indicates that Mabel Adams saw the Testatrix "*on numerous occasions*" after the execution of the will and was *refused admission only once*. Nothing in the record, either on p. 118 or elsewhere, substantiates this statement; Mrs. Adams' testimony (R. 40, 44, 182) seems to be that she saw the Testatrix only once after she was discharged.

On p. 4 also Respondents state that, "*contrary to the statement of counsel for the petitioners on page 5 of his brief*" the trial judge never expressed the opinion that a confidential relationship had been shown to have existed between the Testatrix and the Respondent Mrs. Metz. Respondents' statement is refuted, and Petitioners' supported, by the Court's words appearing on p. 572 of the transcript (reference to the latter p. having been inadvertently omitted from Petitioners' petition): "The Court: *Well, the confidential relationship most certainly is one existing between Mrs. Metz and the decedent immediately after the power of attorney was granted, if not before. It was granted on the 31st day of March and the will was executed on the 14th of April;* and most certainly there was a confidential relationship between the doctor and the nurse.

Unless that case has been changed". (Hagerty v. Olmstead, 39 App. D. C. 170) *"that is the law* • • •." And the record also shows (Tr. 571) that the Trial Judge also approved counsel's statement that a confidential relationship existed between the Testatrix and Mrs. Metz, *because the latter was managing the Testatrix's household and affairs under the power of attorney,* with the words: *"That makes it practically conclusive in my mind."*

On p. 5 Respondents say (referring to R. 175) that no exceptions were taken by either party to the Trial Judge's charge to the jury. This statement, too, is erroneous, as the record page shows. As the record also shows, no opportunity was afforded Petitioners to make objections out of the hearing of the jury; the exceptions taken by Petitioners were taken in the jury's presence. Petitioners' Prayers Nos. 2 and 7, as pointed out in the petition, had been previously discussed with the trial judge at the bench and denied. And one of Petitioners' principal points raised in their Petition is that the Circuit Court erred in holding that an exception was required to the Trial Judge's failure to cover in his charge the instructions therein prayed for; that, under Federal Civil Procedure Rule 46 no exception was necessary. The record page referred to indicates also that the Trial Judge thought no exception necessary to his direction of a verdict on the issue of fraud, because that, too, had been previously passed upon by him.

Analysis of Respondents' Argument.

In Par. 1 of Respondents' argument, beginning on p. 7 of their brief, in attempting to distinguish between the Hagerty case and the one at bar, they say that the chief beneficiaries in the contested will "were related to the testatrix" and "had nothing to do, according to the evidence • • • with the dictation of the terms of the will • • •." Yet, as pointed out in the petition, the record (R. 89, 90, 92) shows

that the beneficiary Mrs. Metz was heard to dictate certain provisions of the will over the telephone, and that she procured her own attorney to draw the will (R. 117, 119, 126). Respondents also seem to contend that no confidential relationship, in a legal sense, can exist between blood relatives.

Referring to Par. 2 of Respondents' argument (p. 12 *et seq.*): The Trial Judge, as the record shows, did not grant a motion for a directed verdict on the *issue of fraud* (p. 3) before Mrs. Metz had testified, but at the time announced his intention to direct it on the *issue of undue influence;* although he finally let the undue influence issue go to the jury and directed a verdict instead on the issue of fraud. Moreover, as shown in the petition, the testimony of Mrs. Metz referred to by Respondents was not the only substantial evidence of fraud. Before any motion for a directed verdict was made, there had been given Mrs. Pollard's testimony as to the telephone conversation (R. 89, 90, 92), above mentioned, and testimony of witnesses for the caveators and of Mrs. Adams indicating most strongly that the Testatrix had never directed or desired the latter's dismissal, *and never knew why she left.* The petition also points out other substantial evidence of fraud. The record discloses, too, that the facts in evidence comprise practically all the elements, only some of which, according to the majority rule in these United States, are required to raise *the presumptions* of fraud, undue influence and testamentary incapacity. *The uncontradicted facts are set out in the petition under the Statement of Matter Involved.*

Petitioners' counsel has carefully read and studied all the cases cited by Respondents, and has found it most difficult to follow Respondents' reasoning in connection with them. Since the issue of *undue influence* was submitted to the jury in the instant case (although not under proper instructions), cases on this issue are certainly not in point. How-

ever, the question of whether or not the facts raised *a presumption of undue influence,* and whether or not the Trial Judge erred in failing to so instruct the jury, is a main point in issue here. Petitioners, therefore, wish to present here *some additional cases showing the general majority rulings in will cases* and the rule in some of the various States on this presumption, in order that this Court may have a fair cross-section of the established law before it:

Alabama: *Little v. Sugg,* 243 Ala. 146 (1942).
Ziegler v. Coffin, 219 Ala. 586 (1929).

Florida: *Wartman v. Burleson,* 190 So. 789 (1939).

Missouri: *Heflin v. Fullington,* 37 S. W. 2d 931 (1931).

Nebraska: *In Re Kajewski's Est.,* 279 N. W. 185 (1938).

New Jersey: *In Re Nixon's Est.,* 41 A. 2d 119; 136 N. J. Eq. 242 (1945).

New York: *Tyler v. Gardiner,* 35 N. Y. 589 (1866).
In Re Wheeler's Will, 25 N. Y. S. 313 (1885).

Oregon: *In Re Brown's Est.,* 108 P. 2d 775 (1941).

So. Dakota: *In Re Rowland's Est.,* 18 N. W. 2d 290 (1945).

Virginia: *Barnes v. Bess,* 197 S. E. 403 (1938).
Culpepper v. Robie, 154 S. E. 687.

Washington: *In Re Jaaska's Est.,* 178 P. 2d 321 (1947).

Wisconsin: *In Re Stanley's Will,* 276 N. W. 353.

Also, the well-reasoned and pertinent case of *Lohre v. Starke* (Mo. Sup. Ct. 1932), 56 S. W. 2d 772, wherein the Court said: "*The presumption and fact or inference go hand in hand and really are the same thing. Hence the presumption, with its underlying facts or inferences, once be-*

ing in the case, never does or can disappear, but raises an issue for the jury.'' We submit that this means that when the facts in evidence raise the presumption of undue influence, the jury must be properly instructed concerning it and its effect on the weight of the evidence. This the Trial Judge, in the case at bar, did not do. Moreover, this rule should apply, also, to the Trial Judge's directing a verdict for Respondents on Issue No. 3 (Fraud).

The Boosalis case (Resp. Br. 24, 25) clearly supports Petitioners, both as to the direction of a verdict (on issue three—Fraud and Deceit) and the doctrine of *res inter alios acta*. In short, it is submitted, Respondents' brief is without foundation in fact and in law throughout.

Conclusion.

Petitioners submit, therefore, that Respondents in their opposing brief, have given no reasons, nor have they cited any applicable authorities to show, why this Court should not take jurisdiction and grant the petition for a writ of certiorari, review the case at bar, and settle the highly important questions raised, in the general interest of every litigant and lawyer who may be involved in the Federal Courts in a will case or any other case in which these questions may arise, and in order that justice may be accorded these Petitioners and a fair and impartial trial afforded them in accordance with established law. To this end, it is most respectfully urged that the petition for a writ of certiorari be granted and the case heard on its merits.

LUTHER ROBINSON MADDOX,
1032 Woodward Building,
Washington 5, D. C.,
Attorney for Petitioners.

MARIE FLYNN MADDOX,
Of Counsel.

NOTE:—*Italics supplied throughout.*

IN THE

Supreme Court of the United States

October Term, 1948.

No. 450

NANNIE ELLYSON POLLARD, *et al., Petitioners*

vs.

CLAYTON HAWFIELD, *et al., Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

ALBERT BRICK
Attorney for Respondents
517 Denrike Building
Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

SUBJECT INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 450

NANNIE ELLYSON POLLARD, *et al., Petitioners*

vs.

CLAYTON HAWFIELD, *et al., Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Case

It should be noticed that the three last wills and testaments of the decedent, prior to the one in question, named and mentioned Florence Metz, Mary Elizabeth Harvey, and Aubrey Eaton Harvey as principal beneficiaries, and in the 1931 will, one of the appellants Ethel Ellyson Pollard, would take only if Mary Elizabeth Harvey pre-deceased the testatrix whereas, Mary Dowdy, was named as one of the residuary legatees.

In the 1932 will, the only one of the petitioners that was mentioned therein was Mary Dowdy and she would become a beneficiary only if Mary Elizabeth Harvey pre-deceased the testatrix and in the 1941 will, the same situation pertains. Thus it can be seen that in both the wills of 1932 and 1941, the respondents, Mary Elizabeth Harvey and Aubrey E. Harvey and Florence Metz were each given one-

fifth of the residuary estate and for any of the petitioners to have taken anything under any will, executed by the testatrix, all the wills, with the exception of the 1931 will, would have to be proven invalid and in that will, the said Mary Dowdy would have received one-sixth of the residuary estate so that from 1932 down to the execution of the will of April 14, 1944, the testatrix did not give a direct bequest to any of the petitioners. (R. 180.)

Also, it should be remembered that the testimony of Florence Metz indicated that J. Fontaine Hall had been notified to see the testatrix as she desired to execute a new will, but that he failed to see her during that period. (R. 126.)

The testimony of Nurse Edwards (R. 35) does not indicate that she testified that the testatrix had had pneumonia just prior to the execution of the will on April 14, 1944, but said testimony referred to a cerebral hemorrhage and pneumonia "four or five years ago", which resulted in testatrix having been bed-ridden thereafter.

A close examination of the evidence indicates that the attesting witnesses did testify that they were in the same room as testatrix at the time that she signed. Mrs. Blanche Hawfield was asked what the others in the room were doing when she signed the will as an attesting witness, and she stated that "they were watching me sign my name." (R. 180, 181.)

Also, on direct examination, the attesting witness, Stella A. McCombs stated that the testatrix signed the will in the presence of the other witnesses and that she signed it in the presence of the witnesses. (R. 181.)

The testimony of Mattie L. Edwards on direct examination, (R. 33, 34) indicates that the testatrix signed the will when all the witnesses were in the room and that

when she finished signing the will, the other witnesses also signed the will; that all the witnesses were present when she signed the will; and she indicated that each one saw the other witness the will and sign it.

When Mr. Maddox cross examined Dr. Clayton Hawfield (R. 185) the Doctor testified that he was in the room at the time Miss Ellyson signed, that he saw her sign, and that he also saw Mrs. Stella McCombs, Mattie Edwards, and, Mrs. Mary Hawfield, sign as witnesses. The evidence is abundantly clear that the witnesses were in the room when the testatrix signed and executed the will and that they then witnessed said will as attesting witnesses.

It is further to be remembered that when the will was offered to the Court as being fully proven, no objection whatsoever, was raised by either Mr. Maddox or Mr. Diamond on behalf of the petitioners. (R. 181.)

It is apparent that counsel for the petitioners attempts to seek a reversal on the ground that the Attorney for the respondents attempted to testify before the jury in his closing argument. Certainly counsel has a perfect right to draw an inference from testimony that was in the record and it is submitted that it was not irregular nor improper. Furthermore, attorney for petitioners did not ask the Court either to withdraw a juror or declare a mistrial so that his objection now comes entirely too late.

As to the claim of fraud, in this case, there was no evidence sufficient to go to the jury since it must be remembered that there was no showing in the case presented by the petitioners that any fraud was exercised upon the testatrix. The petitioners now seek to claim that Mrs. Metz, who testified as a witness for the respondents, was the one who was guilty of practicing a fraud upon the testatrix, but she testified that she did not inform the testatrix that

no money had been borrowed on the house for the reason that the testatrix did not seem to worry after Mabel Adams was discharged from the household.

The record indicates that Mabel Adams had been to see the testatrix on numerous occasions after the execution of the will (R. 118) and that on only one occasion thereafter was Mabel Adams refused admission to see the testatrix. (R. 181, 182.)

On the testimony of the nurses, it is well to bear in mind that Mr. Diamond, who represented Mabel Adams, and who was in exactly the same position as Mr. Maddox, objected to the attending nurse testifying to any matters concerning her professional work, which objection was sustained, and that Mr. Maddox, at that time, did not urge to the contrary. (R. 143.) On the question of the power of attorney of which the petitioners' attorney made much ado, it is well to bear in mind that the Court advised Mr. Maddox that he would allow the power of attorney to go in for the purpose of impeaching the creditability of the witnesses, but that at no time did Mr. Maddox properly attempt to do so. (R. 123.) When Mr. Diamond, Attorney for Mabel Adams, properly presented the same for purposes of impeachment, the Court properly allowed the power of attorney to become evidence in the case.

Contrary to the statement of counsel for the petitioners on page 5 of his brief, the trial judge never expressed the opinion that a confidential relationship had been shown to have ever existed between the Testatrix and the Respondent, Mrs. Metz. (Transcript 571.) The counsel for the petitioners at no time raised any objection to the trial of this case by the attorney who prepared the will, although he had ample opportunity to do so. (Petitioners' Brief, Pages 6 and 7.)

Counsel for Petitioners did not object to the legatees, as party plaintiffs or defendants, sitting in the rail during the entire trial, in accordance with the custom established in the District of Columbia, and at no time did he make mention of such fact to the Court.

The petitioners in their brief have drawn innumerable conclusions not warranted by the evidence, and to point each and every one of the same would require the respondents to deny nearly each and every paragraph stated by the petitioners. However, since all the testimony in the case is before the Court, only the matter contained therein should be considered. The record does not indicate that the trial judge openly criticized counsel for the petitioners without just cause and reason for doing so. Counsel for the petitioners was difficult to handle throughout the entire trial as can be shown by his manner in the Court room in speaking loudly when counsel approached the bench on matters which the jury was not supposed to hear, and by his loud talking making the same known to the jury. (R. 183, 184.)

It should be noted that when the trial judge completed his charge to the jury, he asked counsel if there were any exceptions to his charge and no exceptions were made by either party. (R. 175.)

Jurisdiction of this Court should not be invoked in a case of this type since no question of general importance nor one of substance relating to the construction or application of the Constitution is presented to this Court nor has the trial Court failed to give proper effect to any decision of this Court.

Summary of Argument

1a. There was no confidential relationship between the testatrix and the respondents within the meaning of the

cases and furthermore, it was not shown that the will was in any manner unnatural to raise any presumption of undue influence.

b. The question of competency of testatrix to execute a will was one for the jury and that it would be improper to state that a presumption of mental incapacity arose.

2. There was no substantial or clear evidence of any fraud or deceit.

3. The disqualification of the physician, Dr. Snyder, was proper and that it was within the sound discretion of the Court.

4. The testimony of the nurses as to the nature of the disease suffered by the testatrix was properly excluded and was not prejudicial.

5. The question of mental capacity and undue influence were properly submitted to the jury and that no objections were properly raised by the petitioners.

6. The charge to the jury was adequate, full and not misleading, nor confusing nor was any proper objection raised by the petitioners' counsel thereto.

7. The evidence prior and subsequent to the execution of the will, as the petitioners attempted to introduce the same, was properly excluded by the Court.

8. The petitioners were not deprived of any rights of cross examination by the Court, nor does it appear that it was in any manner prejudicial.

9. No prejudicial errors by the Court appears of record, nor was any rebuke by the Court prejudicial to the petitioners.

10. That due attestation of the will was proven.

Argument

1. The petitioners' attorney vigorously argues upon the authority of the case of Hagerty vs. Olmstead, 39 App. D. C. 170, that the Court should have instructed the jury that a presumption of undue influence arose in this case. It is well to bear in mind that in Hagerty case, *(supra)*, the testatrix, for a period of three months prior to her death, according to the testimony, bore symptoms of insanity and that there was a marked change in her habits, so as to disclose an abnormal mind. Also it was pointed out that at the time the will was executed, the testatrix was in extremis and died about 24 hours thereafter, and that the Executor and residuary legatees were not related to her and that the Executor knew that his brother, his wife, and he were the chief legatees under the will. He went so far as to advise the testatrix that the memorandum that she had prepared would not stand in Court, if contested, and suggested that a will be drawn in legal form, which he prepared. He even went so far as to leave out a small bequest that the testatrix desired to be given to the matron of the hospital for the reason he stated, that if embraced in the will, it might have given the impression that undue influence had been exerted upon the testatrix, and that finally he took the will to the testatrix, summoned witnesses and supported her up in bed while she signed the same. The facts in that case and in the case at bar are entirely different, for the chief beneficiaries in the case at bar were related to the testatrix, had nothing to do, according to the evidence, with the execution of the will, or the dictation of the terms of the will and had been mentioned as chief beneficiaries in the three prior wills drawn by the testatrix. In the Hagerty case, *(supra)*, the Court at page 176 stated as follows:

> "Where the party," says Mr. Redfield, "to be benefited by the will has a controlling agency in procuring

> its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. * * * Undoubtedly, if the counsel of an old man whose mental faculties are impaired, though not destroyed by advanced age, should draw for him a will giving to himself the bulk of his estate, or a very considerable part of it, it would not be enough to show the formal execution of the paper, in the presence of two subscribing witnesses called in for the purpose. He must go further, and rebut the presumption by some evidence that the disposition made was in the exercise of the free will of the testator."

The Hagerty case, *supra,* mentions the case of Boyd vs. Boyd, 66 Pa. 283, in which the scrivener of the will, was a Justice of the Peace and legal adviser of the testator, and derived considerable benefit from the will, and the said testator had a short time previously, received a severe blow on his head. The Court laid down the proposition that where a party is to receive a considerable benefit from a will and is a stranger, having no claims from relationship, and stands in a confidential relationship, then a presumption of undue influence arises.

In the Boyd case, *supra,* the Court at page 293 stated as follows:

> "But where, being an entire stranger—having no claims from lawful relationship—he derives a very considerable benefit from the act, such direct proof, ought not to be, and is not required * * * General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption, which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefited stands in a confidential relation to the testator."

A clear statement on this proposition also appears in the case, *In Re.* Jacobs Estate, 76 P. 2nd 128, wherein the legatees were not blood relatives and it was shown that the tes-

tatrix was 83 years of age, ill, in bed, but was mentally alert, and the Court at page 129 stated as follows:

> "Where one who unduly profits by a will, sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence * * * Such presumption is not general alone by the existence of a confidential relationship. Such relationship assumes probative importance when disclosed in connection with the facts that the provisions of the propounded instrument are unnatural or unjust, and that the alleged wrongdoer was active in procuring the writing to be executed. If the facts of injustice and activity on the part of the wrongdoer are not established, a denial of probate, cannot be sustained * * * In other words, to use the language of the Supreme Court, there must in addition be proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit, meaning that there must be proof that the will is unnatural. Moreover, it is well settled that collateral heirs, such as brothers and sisters are not natural objects of bounty as that term is used in the interpretation of wills, and therefore, in cases such as this where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons in order to establish that the instrument is unnatural, must show affirmatively that they, had peculiar or superior claims to the decedent's bounty, and if no such claim is adduced, the instrument cannot be held to be unnatural."

There is further stated on page 129, the proposition that:

> "Nephews are not necessarily the objects of the bounty of an aunt".

Also, the Court in the case of MacMillan vs. Knost, 75 App. D. C. 261, 126 F. 2nd 235, in which the testatrix was 76 years of age and left her property to a distant relative, who would visit her from time to time in the District of Columbia, and who admitted he played up to her and took her on a trip and visit to California, had this to say, at page 262:

"As the court told the jury, undue influence involves 'improper means and practices * * *'. Influence gained by kindness and affection will not be regarded as 'undue', if no imposition or fraud be practiced, even though it induce the testator to make an unequal * * * disposition of his property in favor of those who have contributed to his comfort, * * * if such disposition is voluntarily made. *Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence.* * * * One has the right to influence another to make a will in his favor. He may * * * lay his claims for preferment before the testator. They may be based on kinship or friendship or kindness or services or need or any other sentimental or material consideration. One can use argument and persuasion so long as it is fair and honest and does not go to an oppressive degree where it becomes coercive. * * * These instructions state the law of the District of Columbia. Moreover 'possibility or suspicion of undue influence' is not enough.

We find no evidence of oppression or coercion. We find no evidence of improper conduct, as we interpret that term. Appellant's conduct may arouse distaste in reasonable men. Reasonable men, measuring his conduct by their individual standards, may even call it improper. The jury in effect, have done so. But the evidence would not support a finding that appellant's conduct was improper according to commonly accepted standards. That, we think, is the test. In legal theory, the rights of litigants do not turn upon the predilections of a jury, and so upon accidental differences between one jury and another. For example, when negligence is in issue the law undertakes to measure conduct by the normal standards of normal men—the so-called 'reasonable man' or 'ordinary prudent man'—and not by the higher or lower standards of the men who try the issue. On the same principle, conduct which influences a will is not improper, and the influence is not undue, unless it falls below commonly accepted standards."

And furthermore, the Court in the case of Johnson vs. Newton, 58 App. D. C. 118, 25 F. (2d) 542, stated as follows at page 119:

> "As to the first of these grounds, it is not contended that there was any direct evidence of undue influence; but it is argued that the facts and circumstances surrounding the making of the will created a presumption of undue influence, entitling the appellant to go to the jury on that issue. We are of a different view. In Beyer v. Le Fevre, 186 U. S. 114, 22 S. Ct. 765, 46 L. Ed. 1080, the court said: 'Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility of suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.' There is no evidence in this case that any one of the beneficiaries under the will sought in the slightest degree to influence the testatrix. Disinterested neighbors were present, and, if such an attempt had been made, their testimony would have indicated it. The court was right in refusing to submit the issue to the jury."

It has also been stated that the fact that an attorney, or a confidential adviser is named as Executor in a will, is not a suspicious circumstance or one which raises a presumption of undue influence, and which does not operate to discharge the general rule that the burden of proving undue influence is upon the party asserting it and it must be established by clear and convincing evidence. The Court in the case of Millard vs. Matthews, 80 U. S. App. D. C. 123, said as follows:

> "The Court correctly ruled that there was no evidence of undue influence. No presumption of undue influence arises from the fact that a will is drawn and its execution is supervised by the lawyer named as Executor."

The Court in the case of Kraeski vs. Clarke, 69 App. D. C. 348, 101 F. 2d 673, held where the evidence disclosed that the will of a testator, an old man, was drawn up by a lawyer who was procured by the wife of his nephew who with the testator's wife were the main beneficiaries under said will,

that there was no showing of fraud or undue influence even though the lawyer discussed the terms of the will and went over the same with the testator after the will was drawn, while they were alone on each occasion. See also *In re* Marlow's will, 106 N. Y. S. 131, Appeal of Livingston, *et al.* 26 A. 470, 63 Conn. 68; Woodson vs. Holmes, 43 S. E. 467, 117 Ga. 19 and also Carter vs. Dickson, 69 Ga. 82.

B. Petitioner's Prayer No. 7 is defective in that it attempts to have the Court instruct the jury that if a person is enfeebled immediately before or after the date of a transaction, so as to render him incompetent, to complete a transaction, a presumption of incapacity arises. This is not the law and neither the case of McCartney vs. Holmquist, 70 App. D. C. 334, 106 F. (2d) 855, nor Thomas vs. Young, 57 App. 282, 22 F. 2nd 588, states that a presumption of mental incapacity arises, but does state that it is a question of fact for the jury who may infer that a state of mind existing prior to the time of the execution of the will existed at the time the will was made. This instruction is confusing and the first paragraph is entirely different in meaning from the second paragraph of the instruction and since it does not state the law in the District of Columbia, it would have only tended to confuse and mislead the jury.

Petitioner's Prayer No. 3 was similar to one considered in the case of Millard vs. Matthews, *supra*, and was properly denied.

2. The Court properly directed a verdict on Issue No. 3, that no fraud or deceit had been practiced because there was no substantial evidence presented in the case, of either fraud or deceit. The facts that petitioners attempt to avail themselves of from the testimony of Mrs. Metz, could not be considered by the Court, when the respondents asked for a directed verdict on that issue. And furthermore, there is nothing in the testimony by Mrs. Metz to indicate that any

fraud was practiced upon the testatrix or that Mrs. Metz in any manner influenced or had anything to do whatsoever with the dictation of the terms of the will. Furthermore, the evidence is abundant that the testatrix was dissatisfied with Mabel Adams, her housekeeper of long standing. (R. 45, 109, 111, 112, 132, 144, 145, 146, 151, 161.)

On the question of fraud, our Court has stated on numerous occasions that fraud and deceit must be shown by clear and convincing evidence and not be evidence that is equivocal. In the case of Public Motor Service vs. Standard Oil Company of New Jersey, 69 App. D. C. 89, 99 F. (2d) 124, the Court at page 91 stated as follows:

> "We think that the trial Court correctly ruled that there was insufficient evidence of fraud to take the case to the jury. The rule is settled that in an action at law where the issue is fraud, the party relying upon fraud must show that the misrepresentations asserted were made either with knowledge of their untruth or in reckless disregard of truth".

And states further on the same page that

> "it is settled also that fraud must be shown by clear and convincing evidence (cases) * * * and by evidence which is not equivocal, that is, equally consistent with either honesty or deceit * * * cases."

There is no substantial or clear and convincing evidence of any fraud exercised upon the testatrix by anyone involved in the preparation of the will. The mere fact that a dispute or disagreement arose between the testatrix and Mabel Adams does not show any fraud.

At page 93, the Court also stated as follows:

> "It may be that the records disclose a scintilla of evidence indicating fraud; but, if so, that would not be enough to sustain a verdict of wrongdoing. (Authorities cited.)"

In the case of Robertson vs. Duvall, 27 App. D. C. 535, at page 544, the Court stated as follows:

> "There was evidence that the testator was displeased with the caveator. Such resentment often leads a tes-

> tator to cut off a legatee, but where the testator has the capacity to make a will, it is his will, whether the resentment is well or ill founded; the testamentary paper is not invalidated on account of it."

Thus it can be seen that the fact that a disagreement arose between the housekeeper of long standing and the testatrix, did not place any duty upon Mrs. Metz, or anyone else, to divulge the fact that no loan had been placed against the home as the testatrix supposed, especially when the evidence indicated that after the dismissal of the housekeeper, the testatrix did not seem to worry about anything concerning the household. Therefore, it seems there was no clear and convincing evidence as to any fraud as shown by the evidence presented by the petitioners. The Court properly directed a verdict on the issue of fraud and deceit in favor of the respondents.

Furthermore, in the case of Mackall vs. Mackall, 135 U. S. 167, 34 L. Ed. 84, 10 S. Ct. 705 Rep. the Court at page 172 stated as follows:

> "Influence gained by kindness and affection will not be regarded as 'undue' as no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust distribution of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence."

Also in the case of Leach vs. Burr, 188 U. S. 510, 47 L. Ed. 567, 23 Ct. Rep. 393, which was a case appealed from this Court, the Court at 516 stated as follows:

> "Upon questions of this kind (undue influence, fraud, and mental capacity) submitted to a jury, the burden of proof in this District, at least, is on the caveators. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial Court did not err in directing a verdict against them."

In the case of Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720 the Court at page 94 stated:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' "

See also Shapiro vs. Rubens, 166 F. (2d) 659.

3. It is earnestly urged that the Court was not in error and did not abuse its discretion in refusing to allow the testimony of Dr. Luther H. Snyder, as an expert on mental capacity. A perusal of the record (R. 99-101) indicates that the Doctor was introduced to show that he was an expert on the particular form of paralysis that was claimed the testatrix had, and that the appellants were attempting to show by his testimony that since he had handled cases of paralysis, then he could testify as to the effect of paralysis on the mental facilities of the testatrix. The Court properly excluded this testimony, and it submitted that the exclusion of his proposed testimony was not error and was not prejudicial in any manner to the petitioners. Furthermore, there was no attempt to properly qualify the Doctor by showing that he had ever handled any cases which involved the mental capacity of the patient, or that he had had any experience whatsoever along that line, either in practice or in training.

Furthermore, the Trial Judge stated that Dr. Snyder could testify as a physician generally but could not give his opinion as to effect of paralysis on mental faculties. (R. 101.) As the Circuit Court pointed out in its opinion that no where did it appear from the evidence that Dr. Snyder

had any experience or training in mental diseases. Nor does it appear he ever treated or observed any paralytic case which had resulted in the impairment of the mind of a patient. (R. 188.)

The only attempt Mr. Maddox made was to show that he had handled cases of paralysis and had handled paralytics. This we submit under any rule, would not have qualified the Doctor to testify. In the District of Columbia, our Court has held that the question as to whether a witness can qualify as an expert so as to answer a hypothetical question lies in the sound discretion of the trial justice and his rulings thereon will not be disturbed unless clearly erroneous. This was enunciated in the case of District of Columbia vs. Chessin, 61 App. D. C. 260, 61 F. (2d) 523. Furthermore, in the case of Lewis vs. American Security and Trust Co., 289 F. 916, 53 App. D. C. 258, the Court at page 264 decided that

> "Where a physician is well acquainted with the decedent and had testified from his observation that he had noticed no change in the mental powers of the decedent, and had also stated that he was not an alienist, it was proper to exclude cross-exam. of him by means of hypothetical questions, since his information was based on his observation, and the fact that he was a physician, while it added weight to his testimony, did not change its character."

It stated as follows at page 264:

> "Thereupon counsel for the caveators propounded a hypothetical question to the witness, to which counsel for the caveatees objected, on the ground that the witness had not testified as an alienist, but that no objection would be interposed to any question based upon the observation of the witness. This objection was sustained by the Court, and thereafter the witness was interrogated, without objection, as to his observation of patients having senile dementia and other similar ailments.
> The foregoing rulings were correct. The witness was not an alienist, stated that he was not, and his in-

formation was based upon and limited to observation. The fact that he was a physician added weight to his testimony, but did not change its character."

And furthermore, in the case of Hamilton vs. U. S., 26 App. D. C. 391, the Court stated as follows:

"The Court correctly refused to permit Hudson to testify as an expert concerning the mental condition of the appellant at the time of the homicide. Hudson was not competent to so testify, [being a medical school student although he had attended lectures on mental diseases]. He was offered for that purpose only. Apart from the incompetency of the witness disclosed by the record, this court has said: 'The question as to how much knowledge a witness must possess of a certain science or art in order that his opinion shall be competent evidence is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous.'"

In the case of Taylor vs. U. S., 7 App. D. C. 27, a murder case in which the Trial Court refused to allow a doctor to testify who was a young practitioner of medicine and who had practiced for only two years, dealing exclusively with nervous diseases in hospitals, and when it was shown that he did not have any experience whatever with gun wounds, the Court properly refused to allow him to give his opinion as to whether the three wounds which had been inflicted six months previously were caused by one or two balls. The doctor who was allowed to testify, was shown to have been qualified because of his study of mental disorders with an average of 15 cases of insanity under his observation each year; having had appellant constantly under his observation only a year past; and having made five formal examinations of him.

The rule as stated in New York, Mass., and Maine and other states, is that only an alienist can legally testify as to the mental capacity of the decedent (See *In Re* Lindow's Will, 270 N. Y., Suppl. 771, Old Colony Trust Co.

vs. DiCola, 123 N. E. 454, 233 Mass. 119, Hutchins vs. Ford 19 A. 832, 82 Me. 363). In analyzing all the cases in which doctors have been allowed to testify as to mental capacity, there must have been a showing that either in the training of the physician or in his practice, he has dealt with questions of mental capacity and mental diseases and disorders of the patients. See 54 A. L. R. 863.

4. It is submitted that the Court's charge was clear and unambiguous and that it is interesting to note that in the case of Johnson vs. Newton, *supra*, at page 19, the Court said as follows:

> "Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

Furthermore, there is no evidence in the case at bar that any one of the beneficiaries under the will, in the slightest degree, tried to influence the testatrix. Also, the fact that the testatrix did not attempt to make any changes in the will after the execution of the last will is a fact to be considered, (See Brooke vs. Barnes, 61 App. D. C. 161, 58 F. (2d) 887). In the case of McCartney vs. Holmquist, *supra*, the Court at page 336 stated as follows:

> "Complaint is made of the refusal of the trial judge to give to the jury certain requested prayers for instructions. These we have examined and compared with the charge given by the Court. It would serve no useful purpose to set out the requests and charge in terms. It is elementary that where a charge given fully informs the jury as to the law, it is not error to refuse requested instructions to the same effect."

The Court in MacMillan vs Knost, *supra*, at page 262, laid down the same proposition, see page 9, *supra*.

Also in the case of Sorrels vs. Alexander, 79 App. D. C. 112, 142 F. (2d) 69, the Court said:

> "There was substantial evidence on which the Court may properly submit the two queries (capacity and undue influence) to the jury. In this view, while we might have reached a different result, we may not on that account substitute our guess for that of the jury."

The charge to the jury, by the trial Court, was complete, clear, and understandable. The petitioners make much of the fact that the Court in discussing the question of undue influence, told the jury that they must find that the testatrix was held "in bond or as the book states in chains". It is submitted that in the case of Towson vs. Moore, 11 App. D. C. 377, the Court indicated that the law in this jurisdiction was properly expressed in those terms when it stated at page 381:

> "Undue influence says the Supreme Court of the United States in the case of Conley vs. Nailor, 118 U. S. 127, 134, 'the undue influence for which a deed or will will be annulled must be such that the party making it has no free will, but stands *in vinculis*. It must amount to force or coercion, destroying free agency (citing, Stulze vs. Schaeflle, 16 Jurist 909, citing other cases).' In this same connection that Court cites with approval the case of Eckert vs. Floury, 43 Pennsylvania State 46, and the case of Davis vs. Calvert, 5 Gill and J. 269, 302 in both of which the same doctrine is laid down in substantially the same language."

Furthermore no objection was made to the Court's charge by counsel for the petitioners and that they, therefore, waive any right to object to the same at this time. See Donovan vs. Brown, *supra*.

It is submitted that the argument contained on page 29 of the Petition for Writ of Certiorari in which counsel attempts to raise a question of interpretation of Rules 46 and 51 of the Federal Rules of Civil Procedure, is inapplicable in this particular case because counsel now attempts to

contend to this Court that the instruction of the trial judge to the jury was confusing and misleading and, therefore, that he comes into the doctrine set forth in the case of William vs. Powers, 135 F. 2nd 153; Hower vs. Roberts, 153 F. 2nd 726, when as a matter of fact, those cases are not applicable to the case at bar. In the first place, it does not appear from the record that any error was committed by the trial judge, and that these matters were not brought to the attention of the trial judge during the trial. When the trial judge completed his charge to the jury, which we submit was proper and gave to the jury a full understanding of the case, no objection was made by counsel for the petitioners. (R. 175.) It is only in exceptional cases where a plain miscarriage of justice appears from the record that a Court will take notice of errors that have not been called to the attention of the Court. (Hormel vs. Helvering, 312 U. S. 552.)

On page 31 of the Petition for Writ of Certiorari, the counsel for petitioners draws an unwarrant conclusion that the Circuit Court did not read the entire record in the case and we submit that such statements should not be made unless some proof is adduced that such was the fact. A perusal of the opinion of the Circuit Court at page 3 shows that not only did they consider those matters specifically called to their attention by counsel for the petitioners, but also said as follows:

> "Taking this view of the record before us, the trial judge properly directed a verdict on the third issue."

As a matter of fact, this statement indicates that the Court most carefully did read the record submitted to it by counsel.

5. The evidence in this case on the question of mental capacity and undue influence was conflicting and it was properly within the province of the jury to determine the

question. It is difficult to follow the argument of counsel and categorically answer each and every objection that he has raised.

In the case of Obold vs. Obold, No. 9403, decided July 14, 1947, 75 Washington Law Reporter 1045, the Court stated at page 1046 as follows:

> "We have gone to great pains to examine the testimony offered on the trial, and we find, as is usually the case, that there is considerable evidence pro and con on the question of mental capacity. But as to this, it is enough to say that all the evidence was fairly submitted to the jury under proper instructions of the Court and, in the circumstances, it is not permissible that we substitute our opinion for theirs. That leaves, then, only certain technical grounds of error in the admission and rejection of evidence and in the granting and refusing of certain prayers."

The petitioners did not object to the introduction of the will in the evidence.

This Court in Gas Consumers Association vs. Lely, 61 App. D. C. 29, 57 F. (2nd) 395 stated at page 30 as follows:

> "Of these assignments of error, the first is based upon the denial of a motion for a directed verdict at the close of the plaintiff's case, the exception to which was waived by the defendant company when it proceeded with its case upon its evidence, and therefore requires no discussion here.
>
> "And, similarly, the exception to the court's denial of a motion for a new trial needs no discussion, as no showing of abuse of discretion is attempted, or could be justified by the record if it were.
>
> "The fifth assignment of error that 'the court erred in its charge to the jury' is too general for consideration here, and the record does not show that any exception was taken when the charge was delivered or that any objection was made to it which the trial court could consider and correct."

Also the Court in the case of Richardson vs. Richardson, 72 D. C. 67, 112 F. (2) 19, stated at page 70 as follows:

> "Since we may consider on appeal only those rulings on the admissibility of evidence to which objection has been made in the trial court, we cannot review the admission in evidence of testimony by Mrs. Mitchell, to which no objection was made, concerning a telephone conversation allegedly had with the defendant concerning the latter's relations with Mr. Mitchell."

In the case of Donovan vs. Brown, in 75 U. S. App. 93, 124 F. (2) 295, a *Per Curiam* stated as follows:

> "On this appeal, appellant objects to the trial court's charge to the jury, but the so-called bill of exceptions does not indicate that he did so at the trial. The objection comes too late. Martin v. Washington Times Co., 67 App. D. C. 11, 89 F. 2d 230. It is a salutary rule that errors which the trial court is given no opportunity to correct will not, in general, be considered on appeal."

6. It was not an error or prejudicial to petitioner's case for the Trial Court to exclude testimony of Nurses Scott and Edwards as to the particular disease from which the testatrix was suffering prior to the time she signed the will on April 14, 1944. Again it is significant to point out that Mr. Diamond who represented Mabel Adams, objected to Miss Scott testifying to any matters that resulted from her privileged position, and at that time, Mr. Maddox did not indicate to the contrary to the Court. Furthermore, in the case of Eureka Md. Assurance Co. vs. Gray, 74 App. D. C. 191, 121 F. (2d) 104, the Court determined that an intern came within the prohibition of the Statute D. C. Code—Title 14, 503, concerning a physician's testifying as to any information obtained by him in his professional capacity.. By analogy this statute should bar a nurse, who stands in a similar position to a patient, as an intern, from testifying as to any particular disease or illness from which the testatrix was suffering. For in that case, at page 194, the Court stated as follows:

> "The local statute is very broad. It forbids disclosure by the physician of any information obtained by him in his professional capacity. The intern is himself a physician * * * In many instances he does the work of the physician and in other respects relieves the physician of professional services which he would ordinarily perform. It would be straining the law to hold that disclosures made to him by the patient are not equally privileged as those made to the physician in charge."

There was no showing from the evidence that either nurse had sufficient training and qualification so as to testify from her own knowledge as to the type of disease or illness from which the testatrix suffered. In the case of Miss. Power and Light Co. vs. Jordan, 143 Southern 483, 164 Miss. 174, the Court at page 485 stated as follows:

> "As to the testimony of the nurses, we are of the opinion that they did not qualify sufficiently to testify as experts and could not do so from the mere training given nurses. In order to qualify as experts, there must have been not only training in different diseases and symptoms, but there must have been sufficient practical experience to enable them to discriminate between symptoms and conditions of different diseases."

It is submitted that we fail to see where the rule or law as contended by the attorney for the petitioners has been clearly or inferentially laid down by either our Code or by the ruling Federal Law.

7. It is submitted that the trial Court was correct in refusing to allow the petitioners, under the facts in this case, to go completely into the execution of the power of attorney and to the management of the household affairs of the testatrix, including events after the death of the testatrix. Nowhere have the appellants shown that they were prejudiced by the Court's rulings and furthermore the Court did, when the matter was properly presented for the purpose of contradicting Mrs. Metz, allow the introduction into evidence the power of attorney so that the

matter was before the jury when the jury considered this case. See *In Re* Carpenter's Will, 300 N. Y. S. 375, where the question before the Court pertained to and involved the matter of a bill of particulars and the Court at page 376 stated as follows:

> "The bill of particulars was properly required * * * the general rule is that pleadings and proof of facts subsequent to the execution of a will are inadmissible on the charge that the instrument is the product of undue influence and fraud. Here, however, the charge is beyond the usual scope * * * it is claimed that the execution of the will, the issue of the Power of Attorney seven days later, the stripping of the decedent of certain property between the date of execution of the will and his death, her part and parcel of the general fraudulent plan or scheme and the exercise of undue influence. In a given situation, particularly on the issue of actual fraud, no facts tending to prove such fraud are irrelevant as they reasonably bear upon that issue.
>
> "It may be, therefore, that this is the usual case. Whether or not it is cannot be determined with finality until the trial of the action. It may then appear that the situation is without the general rule."

Therefore, the Court after hearing the evidence decided that this evidence came under the general rule that matters prior and subsequent to the execution of the will did not have any direct connection with the execution of the will and, therefore, was properly excluded.

As was pointed out in the case of Olmstead vs. Webb, 5 App. D. C. 38,

> "Much must be left to the sound discretion of the trial judge to discriminate between such facts that are merely collateral and foreign to the issue and such as are connected with it. And, it is only in cases of a clear abuse of such discrimination, that the appellate court will take cognizance thereof."

Also in the case of Boosalis v. Crawford, 69 App. 141, 99 F. 2d 374, the Court at pages 143-144 stated as follows:

> "The testimony of certain police officers as to their observation of the use of the machines by others was

objected to as *res inter alios acta*. This rule of exclusion is designed to apply to evidence of transactions not affecting a party to the litigation and to which he was not a party. See Humble, Evidence (1934) paragraph 342. But the rule is one merely of auxiliary policy authorizing a trial judge to exclude evidence which unduly multiplies issues or which, though relevant, may be unfairly prejudicial. See Hughes, Evidence (1907) pp. 36-7; 1 Wigmore, Evidence (2nd ed. 193) c. 16, and especially therein Section 443 and 444. * * * The manner and effect of the operation of the machines by members of the public, whether testified to by players themselves or by those observing players, is relevant to this issue; and such relevancy is not dependent upon the resolution of collateral issues. The evidence was not unfairly prejudicial."

Thus, it can be seen that the trial judge had it within his power to exclude such evidence which would have unduly multiplied the issues in the case or which, if relevant, may have been unfairly prejudicial and there is no showing on the part of the petitioners that they were in any manner prejudiced by the ruling of the Court in excluding the evidence in question. At the end of petitioners' case and before the respondents were called upon to give evidence, there was no substantial evidence of any kind to indicate that any fraud had been committed upon the testatrix. When all of the evidence of the respondents was in before the Court and jury, and after the power of attorney had been introduced in evidence, there still was no substantial evidence to indicate any fraud practiced by anyone upon the testatrix.

8. The petitioners it is submitted, were afforded every right to properly and fully cross-examine each and every witness that was called on behalf of the respondents, and those questions which the Court excluded, were properly so excluded either because they were immatrial, irrelevant or inadmissible or for other reasons which were brought to

the Court's attention at the time those questions were asked. There is nothing to show that the right of cross-examination was in any manner denied to the attorney for the petitioners. Furthermore, a general exception of this kind comes too late at this time, especially when the Court gave counsel for the petitioners great leeway at the trial of the case.

9. As to the question of the unwarranted rebuke of counsel being improper, it is submitted that the Court was properly within its rights and no prejudice to the petitioners was shown. In the case of Sprinkle vs. Davis, 111 F. 2nd 925, the Court during the trial of the negligence case, in the presence of the jury, charged the defendant's counsel with constant breaches of his ruling excluding from evidence a page of the record of a previous trial and declared that he would impose a fine upon said counsel if the practice continued. Subsequently in chambers, out of the presence of the jury, counsel for both parties agreed that the excluded evidence was immaterial because the fact was inconsistent and the judge so charged the jury but did not say anything about the severe and unmerited rebuke to the said counsel. In the case at bar, the so-called rebuke by the Court to counsel for the petitioners was not unmerited and a perusal of the record indicates that the Court had a difficult time during the course of the trial with counsel for the petitioners. Counsel for the petitioners regularly persisted in attempting to introduce evidence that the Court had already ruled upon. Furthermore, counsel for the petitioners attempted on numerous occasions, the quite unfair tactic of talking so loud at the bench so that the jury in the jury box and other persons in the Court could hear what he was saying to other counsel and the judge at the bench. (R. 182-185.) Petitioners do not show that the so-called rebuke has in any manner been prejudicial.

10. In the case at bar, the evidence clearly indicates that all the attesting witnesses to the will were in the room and saw the testatrix sign and execute the same and that thereafter these witnesses signed and subscribed to the will.

In the case of Bullock vs. Morehouse, 57 App. D. C. 231, 19 F. (2d) 705, the Court at page 233 cites with approval as follows:

> "It has been held, in so many cases, that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same, but that an acknowledgment before the witnesses that it is his signature, or any declaration that it is his will, is equivalent to an actual signature in their presence and makes the attestation and subscription of the witnesses complete. * * * When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge in fact, though not in words, to the three witnesses that the will was his."

Conclusion

It is contended that the judgment of the Circuit Court should be sustained.

ALBERT BRICK,
Attorney for Respondents,
517 Denrike Building.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 456

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,
Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,
Respondents.

PETITION FOR REHEARING

LUTHER ROBINSON MADDOX,
Attorney for Petitioners.

MARIE FLYNN MADDOX,
Of Counsel.

DAILY TIMES, LAW PRINTERS,
DETROIT, N. Y.
CHARLES W. HARPER, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

SUBJECT INDEX.

Citation of Cases.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 450

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,
Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,
Respondents.

PETITION FOR REHEARING

Pursuant to Rule 33 of this Court, Petitioners pray for a rehearing, and a reversal of the order entered on February 7, 1949, denying their petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit. In conformity with that rule, Petitioners are confining this petition to grounds available to them although not previously presented, based on *conflicting* Circuit Courts of Appeals decisions on a question of transcendent general importance embraced in the first question presented in their petition for a Writ:

> WHEN A WRITTEN REQUEST OR PRAYER FOR INSTRUCTIONS HAS BEEN SUBMITTED TO THE TRIAL JUDGE, FULLY DISCUSSED AND ARGUED, AND UNQUALIFIEDLY DENIED, PRIOR TO THE CHARGING OF THE JURY, IS AN EXCEPTION REQUIRED, UNDER FEDERAL RULE OF CIVIL PROCEDURE NO. 51, TO THE COURT'S DENIAL OF THE PRAYER OR HIS

FAILURE TO COVER IT IN HIS CHARGE; OR IS THE RULING, AND ALSO THE EXCLUSION OF THE PRAYER FROM THE CHARGE, GOVERNED SOLELY BY RULE 46, PROVIDING THAT NO EXCEPTION OR OBJECTION IS NECESSARY IF THE PARTY, AT THE TIME OF THE RULING, MAKES KNOWN TO THE COURT THE ACTION HE DESIRES IT TO TAKE?

Decisions of the various Circuit Courts of Appeals bearing on this question, several of which Petitioners cite below, reveal a wide diversity and conflict of opinion thereon. Some hold, *in line with Petitioners' view*, that it would be a meaningless gesture, not contemplated by Rule 51, to except to the Court's failure to cover in his charge a prayer he had previously pronounced an incorrect statement of the law and unqualifiedly rejected; others that, in order to preserve the question for appeal, an exception, stating grounds, must be taken to anything in the Court's charge deemed defective, whether the point has been previously passed upon or not. Some hold that *Rule 46 alone* applies to such a situation; others, *Rule 51;* and at least two, that both rules must be read together, and that, under circumstances such as are here presented, no exception is necessary, *either to the Court's ruling or his charge*. The latter conclusion seems to Petitioners the most logical and reasonable; and it is probable that the confusion that the opinions disclose has existed in the lower Federal courts ever since the new rules were promulgated, concerning the proper application of the two rules, would have been less had the two been made sections of one rule governing exceptions and objections.

Yet, notwithstanding that the question here raised has been passed upon, *in conflicting decisions*, many times in the several Circuits, and over the whole period of a decade

since the present Federal rules were adopted, it has been brought before this Court for the first time in the case at bar, so far as Petitioners can learn. It follows, therefore, that unless this Court undertakes, by a decision in this case, to resolve the conflict of opinion as to the application of these highly important rules to such a situation as is here presented, many more years may elapse before it again may have an opportunity to do so.

THE RULING OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR

The ruling of the United States Court of Appeals for the District of Columbia Circuit in this case on the question here presented is not only *in conflict with those of other Federal Circuit Courts*, BUT IN CONFLICT WITH THE VIEW OF THAT COURT ITSELF ON THE POINT, IMPLIED IN AT LEAST TWO PRIOR DECISIONS, as will be shown.

In passing on Petitioners' contentions that the trial judge had erroneously denied their Prayers Nos. 2 and 7 (R. 18, 21, 22), on the *presumptions* of undue influence and testamentary INCAPACITY, respectively (raised by certain uncontradicted facts in evidence which had been previously held in this jurisdiction, and are generally held elsewhere, to raise such presumptions), our Circuit Court in its opinion (R. 187, 188) expressly declined to decide whether or not the prayers correctly stated the law, but ruled that it was not error to deny them because, the opinion states, the trial judge's charge on the *issues* of undue influence and testamentary CAPACITY in this will-contest case was correct; *although the charge contained not a word concerning such presumptions*, and was throughout a general charge, nowhere directed to the particular facts in the case.

It is very important to note, in this connection, that the Circuit Court's opinion (R. 187), and all the official reports on this case, consistently INCORRECTLY state that Prayer No. 7 (R. 21, 22) is on the presumption of Testamentary CAPACITY, rather than, as the prayer clearly indicates, on the presumption of testamentary INCAPACITY. By way of emphasizing the theory of the prayer, there is a reference at its start to the presumption of testamentary capacity, followed by the adversative conjunction "BUT" and the prayer defining the situation raising the presumption of testamentary INCAPACITY. It is difficult to understand how the import of the prayer could have been so misconstrued or why it could be believed that a caveator would offer a prayer on the presumption of testamentary CAPACITY.

On the question on which this petition is based, our Circuit Court further said, in connection with the prayers, that SINCE IT DID NOT APPEAR THAT ANY EXCEPTIONS HAD BEEN ASSERTED BY PETITIONERS TO THE CHARGE "ON THESE POINTS", THEY COULD NOT "NOW BE URGED" BEFORE THAT COURT.

This ruling, Petitioners contend, is in conflict with that Court's earlier decision on the point in *Crockett Engineering Co. v. Ehret Manufacturing Co.*, (1946), 156 F. 2d 817, wherein Judge Prettyman in effect held Rule 51 applicable to a prayer *granted*, but not to one *denied*, as appears from the excerpt:

> "At the conclusion of the testimony the court *granted* the following prayer of Crockett's counsel: * * * This prayer * * * was not included verbatim in the court's charge to the jury."

After finding that the prayer had been substantially covered in the Court's charge, the opinion continues:

> "Moreover, we would be constrained to reach the same conclusion because of Rule 51 * * *. Crockett's counsel raised no timely objection to the insufficiency of the charge as given, nor to the court's failure personally to instruct the jury according to the terms of his Prayer No. 4."

Judge Prettyman then takes up and passes upon the appellant's contention that his Prayer No. 7, "*denied* by the Court below, *should have been granted,*" and finds that it was properly denied; *making no reference to Rule 51, as he did concerning Prayer No. 4,* and thus impliedly holding that no exception to the trial court's failure to instruct the jury according to the terms of the *rejected* prayer was necessary, and that the denial of this prayer was governed by Rule 46.

Also, to the same effect, *Lippman v. Williams,* (U. S. App. D. C. 1944), 147 F. 2d 151:

> "The appeal here is based alone on the *rejection* by the court of three instructions requested by appellants."

The opinion then considers at length the three rejected instructions and rules them properly denied and then states:

> "The *general charge* of the court may not have been most happily phrased, but since *it* was not objected to, we cannot consider it."

This decision, too, by implication holds that, while an exception is required to preserve objections to a general charge, none is required to *a prayer denied.*

> Cf. *Cohen v. Evening Star,* (U. S. App. D. C. 1940), 113 F. 2d 523.

As illustrating *the diametrically opposite conclusions* reached on this question by some of the other Federal Circuit Courts, Petitioners here cite, first, those supporting

Petitioners' view, and follow with those agreeing with the ruling of our Circuit Court in the case at bar. A survey of the cases passing upon the two rules indicates that the majority holding exceptions or objections, stating grounds, to be required under Rule 51 deal with a ruling granting a motion or a prayer adverse to the appellant's contentions; or a charge omitting the appellant's granted prayer or considered by the appellant insufficient or erroneous. Petitioners do not question that to any such situation Rule 51 applies; but they respectfully insist that as to a ruling denying *in toto* a tendered prayer, *Rule 46 alone* governs, and that, *since the prayer itself (and in this case the discussion concerning it) has made known to the Court the action desired,* no exception or objection to either ruling or the Court's charge failing to cover the prayer is required.

OTHER FEDERAL CIRCUIT COURTS SUPPORTING PETITIONERS

Sweeney v. United Features Syndicate, Inc. (2nd Circ., 1942), 129 F. 2d 904:

> "Although the plaintiff took no formal exception to such refusal, he now seeks to predicate error upon the *refusal to charge* plaintiff's request No. 12: * * * The defendant has taken the position that the *denial* to charge this request is not properly before the court because the record on appeal does not show any exception taken as required by Rule No. 51 * * * It is unnecessary to pass upon the motion to amend the record since we may *consider the refusal to charge as requested in these circumstances even though no formal exception appears in the record.* * * * The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and if necessary correct them. * * * *Here it appears that there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law,* and the entry of a formal exception after that would have been a mere technicality. *Those cases construing Rule 51*

strictly all involve situations where no indication was given to the judge that error would be assigned to his ruling."

Williams v. Powers (6th Circ., 1943), 135 F. 2d 153:

"The points assigned by appellant * * * 1. The correctness of the charge to the jury in connection with contributory negligence, which was offered by appellee * * *. 2. The *refusal* of the court to instruct the jury at the request of appellant as follows: * * * *Appellee insists that appellant has waived the error on which he now relies because of his alleged failure to comply with * * * Rule 51 * * *.* There appears in the record a statement by the trial judge that before the jury retired the attorneys for the respective parties discussed with him in chambers the requests of each of them, and at the conclusion of this discussion the trial judge *denied all of appellant's requests* and all of appellee's requests except * * *. *Rule 46 * * * modifies the previous practice of formal exceptions to rulings or orders of the court and makes it sufficient for review* that at the time the ruling or order of the court is made or sought, the party makes known to the court the action which he desires the court to take *or* his objection to the action taken and his ground therefor. *Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient.* * * * In our opinion we should consider the objection of appellant to the instruction given."

Cf. *Hower v. Roberts* (8th Circ., 1946), 153 F. 2d 726, citing the Williams case.

Union Pacific Co. v. Owens (9th Circ., 1944), 142 F. 2d 145:

"The prime reason for Rule 51 is that the trial judge shall be informed of any error in the instruction that he may correct it before the case is submitted to the

> jury. *It will be seen that the point has been made. The court, therefore, was well aware of the claimed error when it gave its instructions and refused the proposed instruction.*" Held that no exception to the charge was required.

United States v. Barndollar (10th Circ., 1948), 166 F. 2d 793:

> (Referring to Rule 46) "In order to preserve a question for review on appeal, a litigant is required to make known to the court the action he desires taken *or* his objection to the action taken and his ground or grounds therefor. * * * Here the complaint and the statement of counsel made early in the trial *left no room for oversight or doubt,* * * * *and that was sufficient to preserve for review the correctness of the action of the court* * * *.*"

Also, *Monaghan v. Hill* (9th Circ., 1944), 140 F. 2d 31, holding that there is no need for formally expressing objections to the Court's ruling where the Court knows that it does not agree with the party's opinion as to what he is entitled to.

United States v. Rayno (1st Circ., 1943), 136 F. 2d 376:

> "The court then called counsel to the bench and after some colloquy the United States Attorney began to take his exceptions to the failure of the court to charge as he had previously requested in writing. * * * No point is made that his objection was not sufficiently specific * * *. *Nor do we think that the point, if made, would be good because* * * * *the court must have been well aware of the legal theory upon which the United States Attorney wished to have the case submitted to the jury.*"

Cf. *Mass. Bonding & Insurance Co. v. Preferred Automobile Ins. Co.* (6th Circ., 1940), 110 F. 2d 764; *Ulm v. Moore-McCormack Lines, Inc.* (2nd Circ., 1940), 115 F. 2d 492; *Evansville Container Corp. v. McDonald* (6th Circ., 1942), 132 F. 2d 80; *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, (2nd Circ., 1947), 163 F. 2d 643.

CONTRARY DECISIONS OF OTHER FEDERAL CIRCUIT COURTS

Blair v. Cullom (2nd Circ., 1948), 168 F. 2d 622:

> "Appellant charges that certain portions of the charge were erroneous. The record, however, shows that, when asked if there were any exceptions to the charge as given, appellant's counsel replied, *'No exceptions, your honor.'* If we take the record on its face, therefore, Rule 51 * * * precludes appellant from claiming any error on appeal, *unless, as he argues, the fact that he submitted his requests to charge at the opening of the trial avoids the operation of the rule.* * * * *It seems clear that Rule 51 applies and requires objection to those parts of the charge claimed to be erroneous, whether or not requests to charge have been submitted.*"

Reeves Bros. v. Guest (5th Circ., 1942), 131 F. 2d 710:

> "Appellants complain of court's failure to give certain requested charges submitted by them. While the record shows that such charges were submitted to the court, *we have been unable to find the objections to the court's refusal to give the special requested charges as required by Rule 51.* * * * *The trial court's oral charge and failure to give the requested charges not being properly objected to below may not be made ground for reversal here.*"

On a petition for rehearing in the *Reeves* case (132 F. 2d 778), the Circuit Court passed on the rulings denying the requested charges because the unprinted record showed that the rulings had been objected to, and reversed the case.

Dommer v. Penn. R. Co., (7th Cir., 1946), 156 F. 2d 716:

> "Defendant urges that *two proffered instructions were erroneously excluded by the court.* We think that the defendant is precluded from questioning the court's action, as it failed to object thereto at the time of their exclusion. * * * Federal Rules of Civil Procedure, Rule 51 * * *."

To the same effect: *Colley v. Standard Oil Co. of N. J.* (4th Circ., 1946), 157 F. 2d 1007; also, *on this question, Tombigbee Mill & Lbr. Co. v. Hollingsworth* (5th Circ., 1947), 162 F. 2d 763.

It will be noted, moreover, that some of the cases just cited as being in accord with our Circuit Court's view in the case at bar on this question and contrary to Petitioner's, support their rulings with cases decided *before the new rules went into effect.*

Conclusion.

Since the current Rules of Federal Procedure emanated from this Court (under authority of 48 Stat. 1064, 28 U. S. C. A., Sec. 723, (b)), it is surely meet and proper that this Court, as the one of last resort, construe those (such as Rules 46 and 51, herein referred to), that decisions of the Federal Circuit Courts show are being *conflictingly interpreted* by them. It is particularly desirable as to Rule 46, which marks a novel and radical departure from the long-established and deeply rooted practice requiring exceptions in all cases, and which enters into practically every matter that comes before a District Court. This rule, along with Rule 43, governing evidence, and the rules on discovery, is obviously designed, and should be applied, to get around those rigid procedural barriers which have so often in the past barred the just determination of a case.

The ruling of our Circuit Court on the question here presented, and others herein cited in line with it, disregard the benevolent intent of the new rules to unfetter court procedure of ancient technicalities in the interest of truth and justice, and tends to preserve the old order. As was said in *Victory v. Manning* (3rd Cir., 1942), 128 F. 2d 415.

"The general policy of the rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants." And such decisions are not in keeping with this Court's own more recent decisions; for example, *Hickman v. Taylor*, 329 U. S. 459, of which case this Court took cognizance to construe the rules of discovery more liberally than the lower courts had done. It is suggested, and most respectfully urged, that, in the same spirit and in the interest of uniformity in the Federal Circuit Courts (over which this Court has supervisory responsibility) upon this important question of general interest, this court of last resort should consent to pass upon it and thus set all the lower Federal Courts upon the right road; rather than, by declining to take jurisdiction, tacitly to permit them to pursue the widely divergent paths they are now following on the point, often to the great detriment and expense of litigants and lawyers.

THEREFORE, it is respectfully prayed that this petition for rehearing be granted and, upon rehearing, that the order of this Court denying the petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit, be reversed and the said petition be granted.

Respectfully submitted,

LUTHER ROBINSON MADDOX,
1032 Woodward Building,
Washington 5, D. C.,
Attorney for Petitioners.

MARIE FLYNN MADDOX,
Of Counsel.

NOTE: *Italics supplied.*

CERTIFICATE.

Counsel for petitioners certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

LUTHER ROBINSON MADDOX.